No. 8431 LIBRARY SUPREME COURT, U. S.

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TRANSCRIPT OF RECORD

United States Court Of Appeals

TENTH CIRCUIT

No. 5709

JOSEPH AGUILAR GAITAN, Appellant,
vs.
UNITED STATES OF AMERICA, Appellee.

No. 5710

DOLORES MARY GAITAN, Appellant,
vs.
UNITED STATES OF AMERICA, Appellee.

No. 5711

ANISETO SILVA, Appellant,
vs.
UNITED STATES OF AMERICA, Appellee.

No. 5728

JOE ANTHONY EMMETT, Appellant,
vs.
UNITED STATES OF AMERICA, Appellee.

Appeals From The United States District Court
For The District of Colorado

Filed August 22, 1957.

United States Court Of Appeals

TENTH CIRCUIT

No. 5709

JOSEPH AGUILAR GAITAN, Appellant,
vs.
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Statement Of Points On Which Appellants Joseph Gaitan, Dolores Gaitan and Aniseto Silva Rely.

Statement of points on which the appellants rely are as follows:

1. The Court erred in not granting defendants' Motion to Suppress the Evidence, as violation of the Fourth Amendment and as violation of court policy in policing its officers.

2. The Court erred as a matter of law in not granting a mistrial on the motion of the defendants, by its attempted introduction into evidence of what purported to be the police records of all of the defendants, and which were marked Government's Exhibits 19, 20, 21 and 22, and which were or could have been seen or understood by the jury to the prejudice of the defendants before they testified in their own behalf.

Walter L. Gerash
Francis P. O'Neill & Walter L. Gerash
Attorneys for Appellants

Filed August 27, 1957.

Statement Of Points On Which Appellant Joe Anthony Emmett Relies.

Statement of points on which the appellants rely are as follows:

[Clerk's Note: Paragraphs numbered 1 and 2 are identical with paragraphs 1 & 2 of points relied on by Joseph Gaitan et al. page 1 .]

3. The Court erred in allowing the guilty verdict to stand as to Joe Anthony Emmett in Counts 1, 11 and 111, which was not supported by substantial or direct evidence and was contrary to the weight of the evidence, on the theory that a presumptive evidence of guilt is created when proof is introduced that any person shall have had in his possession any marihuana, when there was no proof that Joe Anthony Emmett ever had possession of 5 pounds, 14 ounces of bulk marihuana.

Blair J. Lawther
Attorney for Appellant

Filed Oct. 30, 1957.

Gaitan et al. vs. United States of America

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Pleas and proceedings before The Honorable William Lee Knous, Chief Judge of the United States District Court for the District of Colorado, and The Honorable Jean S. Breitenstein, Judge of the United States District Court for the District of Colorado, presiding in the following entitled cause:

UNITED STATES OF AMERICA, Plaintiff,

vs.

JOSEPH AGUILAR GAITAN, DELORES MARY GAITAN,
ANISETO SILVA and ANTHONY EMMETT,
Defendants.

Criminal Number 15235

1] Indictment.

The Grand Jury charges:

That during the period from on or about the 31st day of December, 1956, to on or about the 5th day of February, 1957, at El Paso, Texas, Dallas, Texas, Pueblo, Colorado, Denver, Colorado, and elsewhere, Joseph Aguilar Gaitan, Dolores Mary Gaitan, Aniseto Silva, Joe Anthony Emmett, and diverse other persons to the Grand Jury unknown, did knowingly and wilfully, unlawfully and feloniously combine, conspire, confederate and agree to commit an offense against the United States and to violate the laws of the United States, to-wit, to transfer and cause the transfer of marihuana to consummers thereof, not in pursuance of a written order form issued in blank for that purpose by the Secretary of the Treasury, in violation of 26 USC 4742(a);

In pursuance of the unlawful agreement, combination and conspiracy aforesaid and for the purpose of carrying out and effectuating the object thereof, the defendants did commit the following:

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Overt Acts

1. That on or about the 31st day of December, 1956, at Pueblo, in the State and District of Colorado, Aniseto Silva placed a long distance collect telephone call to Dolores Mary Gaitan at 1831 Williams Street, Denver, Colorado, telephone number DUdley 8-3536.

2. That on or about the 31st day of December, 1956, at Denver, in the State and District of Colorado, Dolores Mary Gaitan sent and caused to be sent a Western Union Money Order in the sum of $80.00 from Denver, Colorado, to Aniseto Silva in Pueblo, Colorado.

2] 3. That on or about the 31st day of December, 1956, at Pueblo, in the State and District of Colorado, Aniseto Silva presented himself at the Western Union Office and surrendered a Western Union Money Order to such office and received therefor the sum of $80.00.

4. That on or about the 1st day of February, 1957, at Fort Bliss, in the State of Texas, Aniseto Silva borrowed a 1956 Ford, Motor No. M6DV159106, bearing a 1956 Texas license FU 6045, from Menan Schriewer.

5. That on or about the 2d day of February, 1957, Aniseto Silva traveled from El Paso, Texas, to Dallas, Texas.

6. That on or about the 2d day of February, 1957, Joe Anthony Emmett traveled from El Paso, Texas, to Dallas, Texas.

7. That on or about the 2d day of February, 1957, at Dallas, Texas, Aniseto Silva and Joe Anthony Emmett registered at The New Lang Motel, 10103 Garland Road, Dallas, Texas, and resided at such motel until on or about the 4th day of February, 1957.

8. That on or about the 4th day of February, 1957, at Dallas, Texas, Aniseto Silva placed a long distance collect telephone call to Joseph Aguilar Gaitan and Dolores Mary Gaitan at Denver, Colorado, telephone number DUdley 8-3536.

9. That on or about the 4th day of February, 1957, Aniseto Silva and Joe Anthony Emmett traveled from Dallas, Texas,

to Denver, in the State and District of Colorado.

10. That on or about the 5th day of February, 1957, at Denver, in the State and District of Colorado, Aniseto Silva and Joe Anthony Emmett transferred 5 pounds and 14 ounces of bulk marihuana, not in pursuance to a written order form, to Joseph Aguilar Gaitan and Dolores Mary Gaitan.

11. That on or about the 5th day of February, 1957, Joseph Aguilar Gaitan and Dolores Mary Gaitan concealed and facilitated the concealment of 5 pounds and 14 ounces of marihuana in their residence at 1831 Williams Street, Denver, Colorado.

12. That on or about the 5th day of February, 1957, at Denver, in the State and District of Colorado, Joe Anthony Emmett had concealed and facilitated the concealment on his person of 1 ounce and 346 grains of bulk marihuana.

3] 13. That on or about the 5th day of February, 1957, at Denver, in the State and District of Colorado, Aniseto Silva had concealed approximately one grain of bulk marihuana.

Count Two

The grand jury further charges:

That on or about the 5th day of February, 1957, in the City and County of Denver, State and District of Colorado, Aniseto Silva and Joe Anthony Emmett, being persons who were transferees required to pay the transfer tax imposed by Section 4741, did transport and conceal and facilitate the transportation and concealment of approximately 5 ounces and 14 ounces of bulk marihuana, which bulk marihuana had been acquired and obtained without the tax having been paid thereon, all in violation of 26 USC 4744(a)(2).

Count Three

The grand jury further charges:

That on or about the 5th day of February, 1957, in the State of Colorado, Aniseto Silva and Joe Anthony Emmett did transfer to Joseph Aguilar Gaitan and Dolores Mary Gaitan 5 pounds and 14 ounces of bulk marihuana, not in pursuance of a written

order of the said Joseph Aguilar Gaitan and Dolores Mary Gaitan on a form issued in blank for that purpose by the Secretary of the Treasury, in violation of 26 USC 4742(a).

Count Four

The grand jury further charges:

That on or about the 5th day of February, 1957, in the City and County of Denver, State and District of Colorado, Joseph Aguilar Gaitan and Dolores Mary Gaitan did acquire and have transferred to them, receive and have in their possession 5 pounds and 14 ounces of bulk marihuana, without having paid the transfer tax required by law, the said Joseph Aguilar Gaitan and Dolores Mary Gaitan then and there being transferees within the meaning of Section 4741 and being persons subject to paying the said tax thereon at the time of the transfer, as aforesaid, in violation of 26 USC 4744(a)(1).

4]

Count Five

The grand jury further charges:

That on or about the 5th day of February, 1957, in the City and County of Denver, State and District of Colorado, Joseph Aguilar Gaitan and Dolores Mary Gaitan, being persons who were transferees required to pay the transfer tax imposed by Section 4741, did conceal and facilitate the concealment of approximately 5 pounds and 14 ounces of bulk marihuana, which bulk marihuana was acquired and obtained without the tax having been paid thereon, all in violation of 26 USC 4744(a)(2).

A True Bill,
Robert M. Fettes
Foreman.

Donald E. Kelley
United States Attorney.
Filed February 20, 1957.

Gaitan et al. vs. United States of America

5] Arraignment And Plea.

On the 8th day of March, 1957, The United States of America appeared by John S. Pfeiffer, Assistant United States Attorney and the defendants, Joseph Aguilar Gaitan, Delores Mary Gaitan, Aniseto Silva and Anthony Emmett, appeared in person and by their counsel, O'Neil and Gerash, and Blair J. Lawther, before the Honorable Jean S. Breitenstein, Judge of the United States District Court for the District of Colorado, and the defendants entered their individual pleas of not guilty to Counts 1, 2, 3, 4, and 5 of the indictment and it is ordered that the defendants have ten (10) days to file motions.

Entered on the Docket March 8th, 1957

6] Motion To Suppress Evidence of Joseph and Dolores Gaitan and Aniseto Silva. (Under F. R. Cr. P. Rule 41 (e))

Sir: Please take notice that upon the annexed affidavits of Dolores Mary Gaitan and Joseph Aguilar Gaitan, defendants, duly verified on the 18th day of March, 1957, and upon the indictment herein filed on the 20th day of February, 1957, and upon all the pleadings and proceedings heretofore had herein, a motion will be made at the above court to be held in the United States Post Office Building, Denver, Colorado, on the __ day of ___ 1957, at ___ o'clock in the ___ noon of that day, or as soon thereafter as counsel can be heard, for an order declaring unreasonable, illegal and void the search and seizure made in the above entitled action and precluding the United States Attorney from using the evidence upon the trial.

Dated_____

Respectfully submitted,
Walter L. Gerash
Francis P. O'Neill and
Walter L. Gerash,
Attorneys for Defendants

Filed March 19, 1957.

Gaitan et al. vs. United States of America

7] Affidavit.

Joseph Aguilar Gaitan, being duly sworn deposes and says:

That he is one of the defendants in the above entitled action and was residing at 1831 Williams Street, Denver, Colorado, and he respectfully makes the within application so that the search of his apartment at 1831 Williams Street, made in the above entitled action, be declared unreasonable, illegal and void, and that the United States Attorney be precluded from using the evidence against your deponent.

On the 5th day of February, 1957, deponent's above dwelling place was forcibly and illegally broken into and illegally entered.

No warrant of arrest was served or displayed by the officers, either State or Federal.

No search warrant was served or displayed by the State or Federal officers, making the search of the deponent and his dwelling place.

That the aforesaid search and seizure of his property and property locus in quo was unwarranted and illegal in that it violates the Fourth Amendment of the Constitution and the retention or use thereof of any property seized as alleged evidence infringes upon the privilege against incrimination as guaranteed by the Fifth Amendment of the United States Constitution.

8] That upon information and belief, illegal wire-tapping of the telephone of deponent at 1831 Williams Street, telephone number DUdley 8-3536, was effected by State and Federal officers in violation of the laws of the United States.

Wherefore your deponent respectfully prays for an order declaring unreasonable, illegal and void the search made in the above entitled action and precluding the United States Attorney from using the evidence upon the trial, for all of which no previous application has heretofore been made to any court.

Joseph Aguilar Gaitan

[Duly sworn to]
Filed March 19, 1957.

Gaitan et al. vs. United States of America

9] Affidavit.

Dolores Mary Gaitan, being duly sworn deposes and says:

That she is one of the defendants in the above entitled action and was residing at 1831 Williams Street, Denver, Colorado, and she respectfully makes the within application so that the search of her apartment at 1831 Williams Street, made in the above entitled action, be declared unreasonable, illegal and void, and that the United States Attorney be precluded from using the evidence against your deponent.

On the 5th day of February, 1957, deponent's above dwelling place was forcibly and illegally broken into and illegally entered.

No warrant of arrest was served or displayed by the officers either State or Federal.

No search warrant was served or displayed by the State or Federal officers making the search of the deponent and her dwelling place.

That the aforesaid search and seizure of her property and property locus in quo was unwarranted and illegal in that it violates the Fourth Amendment of the Constitution and the retention or use thereof of any property seized as alleged evidence infringes upon the privilege against incrimination as guaranteed by the Fifth Amendment of the United States Constitution.

10] That upon information and belief, illegal wire-tapping of the telephone of deponent at 1831 Williams Street, telephone number DUdley 8-3536, was effected by State and Federal officers in violation of the laws of the United States.

Wherefore your deponent respectfully prays for an order declaring unreasonable, illegal and void the search made in the above entitled action and precluding the United States Attorney from using the evidence upon the trial, for all of which no previous application has heretofore been made to any court.

Dolores Mary Gaitan

[Duly sworn to]
Filed March 19, 1957.

Gaitan et al. vs. United States of America

11] Motion To Suppress As Evidence
Certain Property.

Comes now the Defendant, Joe Anthony Emmett, by his attorney, Blair J. Lawther, and moves this Honorable Court that an order be entered to suppress for use as evidence anything obtained on or about the 5th day of February, 1957, at the premises known and numbered as 1831 Williams Street, City and County of Denver in the District of Colorado, which was unlawfully seized and taken from the Defendants Joseph Aguilar Gaitan and Dolores Mary Gaitan by a deputy of the United States Marshall or an agent of the Federal Bureau of Investigation for the District of Colorado, whose true name is unknown to the petitioner, Blair J. Lawther, and that it be suppressed as evidence against the defendant, Joe Anthony Emmett, in any criminal proceeding.

That said property, illegally seized without a warrant, is believed to be 5 pounds and 14 ounces of bulk marihuana and other similar property.

The petitioner, Blair J. Lawther, further states that the property was seized against the will of the Defendants and without a search warrant.

That any property seized by City and County of Denver authorities was believed to have been done under the authority and control of the Federal Government and said authorities were agents of the Federal Government, and said evidence should be suppressed as being illegally obtained without a warrant.

12] Whereas Defendant Joe Anthony Emmett moves that all evidence obtained without a search warrant be suppressed as being illegally obtained.

Blair J. Lawther-Attorney for
Defendant, Joe Anthony Emmett

Filed March 18, 1957.

Gaitan et al. vs. United States of America

13] Motion For Severance And
Separate Trial
By Defendant Joe Anthony Emmett

Comes now the Defendant, Joe Anthony Emmett, by his attorney, Blair J. Lawther, and moves this Honorable Court that an order be entered severing the offenses charged against Defendant in the indictment No. 15235 from the offenses charged against the other defendants, and for a separate trial, or for such other relief as justice may require, on the ground that the defendant, Joe Anthony Emmett, is prejudiced by the joinder of defendants, Joseph Aguilar Gaitan, Dolores Mary Gaitan and Aniseto Silva, herein, and as grounds for this Motion the Defendant states as follows:

1. That he believes that there will be offered in behalf of the United States Government evidence which will be material and admissible against the other defendants but which is not admissible against Defendant and such evidence does not relate to the reputation of Defendant, Joe Anthony Emmett, but is highly prejudicial to him.

2. That among the items of evidence admissible against the other defendants and showing connection of said other defendants with the crime charged, but not admissible against Defendant, Joe Anthony Emmett, are as following:

(a) That he is advised and believes that certain witnesses for the Government have given statements to agents of the Federal Bureau of Investigation which was taken apart from the defendant Joe Anthony Emmett and may contain statements regarding the defendants, Joseph Aguilar Gaitan, Dolores Mary Gaitan and Aniseto Silva, which may be prejudicial to his case.

14] (b) That he is advised and believes that certain other defendants have given statements to agents of the Federal Bureau of Investigation which was taken apart from the defendant, Joe Anthony Emmett, and may contain statements regrading the defendant Joseph Aguilar Gaitan, Dolores Mary Gaitan and Aniseto Silva, which may be prejudicial to his case.

(c) That said Statement would not be admissible were the defendant tried separately from the defendants Joseph Aguilar Gaitan, Dolores Mary Gaitan and Aniseto Silva.

(d) That the defendant, Joe Anthony Emmett, will be prejudiced if required to go to trial with the defendants Joseph Aguilar Gaitan, Dolores Mary Gaitan and Aniseto Silva.

(e) That in the Indictment No. 15235 the Grand Jury has charged the Defendants, Joseph Aguilar Gaitan and Dolores Mary Gaitan in Count Four and Count Five of said Indictment with criminal offenses but make no mention of the Defendant Joe Anthony Emmett and that evidence regarding said offenses is admissible against Joseph Aguilar Gaitan and Dolores Mary Gaitan but would not be admissible as to the Defendant Joe Anthony Emmett if he were granted a separate trial.

3. That Defendant believes that the United States Government will offer other and additional evidence against the other defendants concerning which it is impossible for him to state at this time more than that it will tend to bear upon the guilt of the other defendants as to the crimes charged against him, but that such evidence will be inadmissible against and prejudicial to Defendant Joe Anthony Emmett.

Whereas Defendant Joe Anthony Emmett moves for trial separate from the other defendants, Joseph Aguilar Gaitan, Dolores Mary Gaitan and Aniseto Silva.

Blair J. Lawther-Attorney for
Defendant,
Joe Anthony Emmett

Filed March 18, 1957.

134] Order.

This Matter coming on for hearing this 29th day of March, 1957, upon the motions of the defendants for the suppression of evidence, the motion of the defendants Joseph Aguilar Gaitan, Dolores Mary Gaitan, and Aniseto Silva, for enlargement of time in which to file motions to dismiss and for disclosure of matters occurring before the Grand Jury, and the motions of the defendants Aniseto Silva and Joe Anthony Emmett, for separate trials, the defendants Joseph Aguilar Gaitan, Dolores Mary Gaitan, and Aniseto Silva appearing by their counsel, Walter Gerash,

and the defendant Joe Anthony Emmett appearing by his counsel, Blair J. Lawther, and the plaintiff appearing by John S. Pfeiffer, Assistant United States Attorney for the District of Colorado, and the Court having heard the testimony of the witnesses and the arguments of counsel, and being advised in the premises,

It Is Ordered And Adjudged that each of the motions of the four defendants for the suppression of evidence be, and the same are hereby denied;

It Is Further Ordered And Adjudged that the motions of the defendants, Aniseto Silva and Joe Anthony Emmett, for separate trials be, and the same are hereby denied;

135] It Is Further Ordered And Adjudged that the motions of the defendants Joseph Aguilar Gaitan, Dolores Gaitan, and Aniseto Silva, for the enlargement of time in which to file motions be, and the same are hereby denied.

Dated this Second day of May, A. D. 1957.

William Lee Knous
Chief Judge

Entered On The Docket May 2, 1957.

469] Verdict.

1. We, the jury in the above-entitled case, upon our oath do say, we find the defendant Joseph Aguilar Gaitan Guilty, and we say we find the defendant Dolores Mary Gaitan Guilty, and we say we find the defendant Aniseto Silva Guilty, and we say we find the defendant Joe Anthony Emmett Guilty as charged in count one of the Indictment herein.

2. We, the jury in the above-entitled case, upon our oath do say, we find the defendant Aniseto Silva Guilty, and we say we find the defendant Joe Anthony Emmett Guilty as charged in count two of the Indictment herein.

3. We, the jury in the above-entitled case, upon our oath do say, we find the defendant Aniseto Silva Guilty, and

we say we find the defendant Joe Anthony Emmett Guilty as charged in count three of the Indictment herein.

4. We, the jury in the above-entitled case, upon our
470] oath do say, we find the defendant Joseph Aguilar Gaitan Guilty, and we say we find the defendant Dolores Mary Gaitan Guilty as charged in count four of the Indictment herein.

5. We, the jury in the above-entitled case, upon our oath do say, we find the defendant Joseph Aguilar Gaitan Guilty, and we say we find the defendant Dolores Mary Gaitan Guilty, as charged in count five of the Indictment herein.

Wilbert J. Trask
Foreman

Filed April 15, 1957.

476] **Motion For Judgment Of Acquittal Notwithstanding The Sentence, And In The Alternative, A New Trial of Joseph Aguilar Gaitan, Dolores Mary Gaitan And Aniseto Silva.**

Comes Now the defendants above named, by and through their attorneys, and move the Court to set aside the sentence of guilty returned in the above entitled action on April 15, 1957, and to enter a judgment in accordance with the motion for judgment of acquittal made by the defendants at the close of all of the evidence herein.

In the alternative, defendants move the Court to set aside the verdict and grant them a new trial for the following reasons:

1. The Court erred in not granting defendants' Motion to Suppress the Evidence, as violation of the Fourth Amendment and as violation of court policy in policing its officers.

2. The verdict is contrary to the weight of the evidence.

3. The Court erred in denying defendants' Motion for

Acquittal made at the conclusion of the evidence.

4. The verdict is not supported by substantial evidence.

5. The Court erred as a matter of law in not granting a mistrial on the motion of the defendants, by its attempted introduction into evidence of what purported to be the police records of all of the defendants, and which were marked Government's Exhibits 19, 20, 21 and 22, and which were or could have been seen or understood by the jury to the prejudice of the defendants before they testified in their own behalf.

6. The defendants were substantially prejudiced and
477] deprived of a fair trial by reason of the circumstances stated in paragraph 5.

6. That this Court erred as a matter of law in instructing the jury on what constituted possession and that the Court's instructions to the jury on the question of possession was error as a matter of law.

Wherefore, the defendants pray that this Court enter an order granting a judgment of dismissal, or in the alternative, a new trial.

Walter L. Gerash
Francis P. O'Neill and
Walter L. Gerash
Attorneys for Defendants

Filed April 19, 1957.

478] Motion For Judgment Of Acquittal Notwithstanding The Verdict And, In The Alternative, For A New Trial of Joe Anthony Emmett.

Comes Now, the defendant, Joe Anthony Emmett, and moves this Honorable Court to set aside the verdict of guilty returned in the above-entitled action on April 15, 1957 and to enter judgment in accordance with the motion for judgment of acquittal made by the defendant at the close of all the evidence herein.

In the alternative, the defendant, Joe Anthony Emmett, moves this Honorable Court to set aside the verdict and grant him a new trial for the following reasons:

1. The court erred in denying defendant's motion for acquittal made at the conclusion of the evidence.

2. The verdict is contrary to the weight of the evidence.

3. The verdict is not supported by substantial evidence.

4. The verdict as to Count I, Count II, and Count III is not supported by direct evidence.

5. The court erred in denying defendant's motion to suppress as evidence certain property, to wit: 5 pounds and 14 ounces of bulk marihuana.

479] 6. The court erred in denying defendant's motion for severance and separate trials.

7. The court erred in charging the jury.

8. The court erred in not granting a mistrial when the prosecution attempted to enter into evidence records showing previous criminal offences committed by the defendants prior to the time when the defendants took the stand as witnesses in their own defence.

Blair J. Lawther - Attorney for Defendant Joe Anthony Emmett.

Filed April 20, 1957.

471] Order.

This matter coming on for hearing the 7th day of May, 1957, upon the motions of the defendants for judgment of acquittal or in the alternative a new trial, the defendants, Joseph Aguilar Gaitan, Dolores Mary Gaitan and Aniseto Silva appearing by their counsel, Walter Gerash, and the defendant, Joe Anthony Emmett, appearing by his counsel, Blair J. Lawther, and the plaintiff appearing by John S. Pfeiffer, Assistant United States

Attorney for the District of Colorado, and the court having heard the arguments of counsel and being fully advised in the premises,

It Is Hereby Ordered that the motions of the defendants for judgment of acquittal as to all defendants on all counts of the indictment be and the same are hereby denied.

It Is Further Ordered that the motions of the defendants for a new trial be and the same are hereby denied.

Dated this 9th day of May, 1957.

William Lee Knous, Chief Judge

Entered On The Docket May 10, 1957.

472] Judgment and Commitment of
Joseph Aguilar Gaitan, Defendant.

On this 24th day of May, 1957 came the attorney for the government and the defendant appeared in person and by counsel;

It Is Adjudged that the defendant has been convicted upon his plea of not guilty as to Counts One, Four and Five of the offenses of Conspiracy to unlawfully transfer marihuana, 26 USC 4742(a); unlawful possession of marihuana, 26 USC 4744(a)(1); and unlawful concealment of marihuana, 26 USC 4744(a)(2), as charged in the Indictment herein and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

It Is Adjudged that the defendant is guilty as charged and convicted.

It Is Adjudged that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of ten (10) years upon each of Counts One and Four of the Indictment herein, said terms of imprisonment to run concurrently.

It is further adjudged that the defendant is hereby

committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of five (5) years upon Count Five of the Indictment herein, said term of imprisonment to run concurrently with the terms of imprisonment imposed on each of said Counts One and Four of the Indictment herein.

It Is Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

William Lee Knous,
United States District Judge.

Entered On The Docket May 24,1957.

473] Judgment and Commitment of
Dolores Mary Gaitan, Defendant.

On this 24th day of May, 1957 came the attorney for the government and the defendant appeared in person and by counsel;

It Is Adjudged that the defendant has been convicted upon his plea of not guilty as to Counts One, Four and Five of the offenses of Conspiracy to unlawfully transfer marihuana, 26 USC 4742(a);unlawful possession of marihuana, 26 USC 4744(a)(1); and unlawful concealment of marihuana, 26 USC 4744(a)(2), as charged in the Indictment herein and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

It Is Adjudged that the defendant is guilty as charged and convicted.

It Is Adjudged that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of five (5) years upon each of Counts One, Four and Five of the Indictment herein, said terms of imprisonment to run concurrently.

It Is Adjudged that

It Is Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

William Lee Knous,
United States District Judge.

Filed May 24, 1957.

474] Judgment and Commitment of Aniseto Silva, Defendant.

On this 24th day of May, 1957 came the attorney for the government and the defendant appeared in person and by counsel;

It Is Adjudged that the defendant has been convicted upon his plea of not guilty as to Counts One, Two and Three of the offenses of Conspiracy to unlawfully transfer marihuana, 26 USC 4742(a); unlawful transportation and concealment of marihuana, 26 USC 4744(a)(2); and unlawful transfer of marihuana, 26 USC 4742(a), as charged in the Indictment herein and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

It Is Adjudged that the defendant is guilty as charged and convicted.

It Is Adjudged that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of five (5) years upon each of Counts One, Two and Three of the Indictment herein, said terms of imprisonment to run concurrently.

It Is Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

William Lee Knous,
United States District Judge.

Filed May 24, 1957.

Gaitan et al. vs. United States of America

475] Judgment and Commitment of
Joe Anthony Emmett, Defendant.

On this 24th day of May, 1957 came the attorney for the government and the defendant appeared in person and by counsel;

It Is Adjudged that the defendant has been convicted upon his plea of not guilty as to Counts One, Two and Three of the offenses of Conspiracy to unlawfully transfer marihuana, 26 USC 4742(a); unlawful transportation and concealment of marihuana, 26 USC 4744(a)(2); and unlawful transfer of marihuana, 26 USC 4742(a), as charged in the Indictment herein and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

It Is Adjudged that the defendant is guilty as charged and convicted.

It Is Adjudged that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of five (5) years upon each of Counts One, Two and Three of the Indictment herein, said terms of imprisonment to run concurrently.

It Is Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

William Lee Knous,
United States District Judge.

Filed May 24, 1957.

480] Notice Of Appeal.

Name and address of appellants:
Joseph Aguilar Gaitan 3914 High Street Denver, Colo.
Dolores Mary Gaitan 3914 High Street Denver, Colo.
Aniseto Silva

Gaitan et al. vs. United States of America

Name and address of appellants' attorney:
Francis P. O'Neill and Walter L. Gerash
830 Majestic Building, Denver 2, Colorado

Offense:

Joseph Aguilar Gaitan	) 26 USC 4742(a)	
	) 26 USC 4744(a)	(2)
Dolores Mary Gaitan	) 26 USC 4742(a)	
	) 26 USC 4744(a)	(1)
Aniseto Silva	) 26 USC 4744(a)	(2)

Concise statement of judgment or order, giving date and any sentence:

Joseph Aguilar Gaitan,	5/24/57:	26 USC 4742(a)-10 years 26 USC 4744(a)(1)-10 years 26 USC 4744(a)(2)- 5 years
Dolores Mary Gaitan,	5/24/57	26 USC 4742(a) - 5 years 26 USC 4744(a)(1) 5 years 26 USC 4744(a)(2) 5 years
Aniseto Silva,	5/24/57	26 USC 4742(a) - 5 years 26 USC 4744(a)(2) 5 years 26 USC 4742(a) - 5 years

All Of The Above Sentences To Run Concurrently

Name of institution where now confined: County Jail

We, the above-named appellants, hereby appeal to the United States Court of Appeals for the Tenth Circuit from the above-stated judgment. Dated this ____ day of May, 1957.

Francis P. O'Neill and Walter
L. Gerash, Attorneys for Appellants

Filed May 24, 1957.

481] Notice Of Appeal.

Name and address of appellant: Joe Anthony Emmett, Denver, Colorado.

Name and address of appellant's attorney: Blair J. Lawther, 3035 East Colfax Avenue, Denver 6, Colorado.

Offense: Conspiracy to unlawfully transfer marihuana, 26 USC 4742(a); unlawful transportation and concealment of marihuana, 26 USC 4744(a)(2); unlawful transfer of marihuana, 26 USC 4742 (a); unlawful possession of marihuana, 26 USC 4744(a)(1), and unlawful concealment of marihuana, 26 USC 4744(a)(2).

Concise statement of judgment or order, giving date and any sentence:

Joe Anthony Emmett: Sentenced to 5 years on Count 1, 26 USC 4742(a); Sentenced to 5 years on Count 2, 26 USC 4744(a)(2); Sentenced to 5 years on Count 3, 26 USC 4742(a).

All Of The Above Sentences To Run Concurrently.

Name of institution where now confined: County Jail.

I, the above-named appellant, hereby appeal to the United States Court of Appeals for the Tenth Circuit from the above-stated judgment.

Dated this 31 day of May, 1957.

Blair J. Lawther - Attorney for Appellant

Filed May 31, 1957.

[An order was entered July 3, 1957 extending the time to docket the appeals to August 2, 1957.]

[An order was entered July 30, 1957 extending the time to docket the appeals to August 12, 1957.]

Gaitan et al. vs. United States of America

[An order was entered August 12, 1957 extending the time to August 22, 1957 to docket the appeals.]

16] Hearing On Motions.

Proceedings had before Honorable William Lee Knous, Chief Judge, United States District Court, District of Colorado, at Denver, Colorado, in the Po t Office Building, in Court Room A, on March 29, 1957, at 1:30 o'clock p.m.

Appearances: Jack Pfeiffer, Esq., Assistant United States Attorney, appearing for the Plaintiff. Walter L. Gerash, Esq., Attorney at Law, 830 Majestic Building, Denver, Colorado; and Blair J. Lawther, Esq., Attorney at Law, 3035 East Colfax Ave., Denver, Colorado, appearing for the Defendants.

* * * * *

25] The Court: Are you both relying upon the same showing with respect to the motions or -- I mean, can the motion to suppress be heard jointly?

Mr. Lawther: Yes; that is all right.

The Court: Then you gentlemen may proceed as you wish then on your two motions. I mean, offer whatever you wish.

Mr. Gerash: I'd like to first, your Honor, take some evidence regarding this motion.

The Court: All right. You can call whoever you wish.

26] Mr. Gerash: Mathew Gress.

Mr. Pfeiffer: At this time, it might be appropriate, we would like to object to any testimony being taken in regard to the defendant Emmett and in regard to the defendant Silva because the affidavits, as far as Emmett is concerned in this matter, first of all there is no affidavit by Emmett at all, it is by his attorney. There is no allegation that he has possessory interests in the residence here, and there is no allegation of ownership in the property seized.

So far as the defendant Silva is concerned, we object to any further proceedings on their motions for the same reasons, that there is no allegation of any ownership of the property seized or any possessory interest in the property that was searched.

We cite as authority for that, Wilson versus the United States, which case arose out of this courtroom and it was taken up with the Tenth Circuit Court of Appeals. It is reported at 218 Federal Second, page 754, and at page 756 the court said:

"The law is well settled that the protection of the Fourth Amendment to the Constitution against unreasonable search and seizure is personal to the one asserting it, and one who claims no proprietary or possessory interest in that which has been seized as a result of a search may not object to its introduction in evidence."

27] I do not think that the motion itself is -- that the petition itself shows enough on its face to proceed any further and it should be dismissed.

As to the motions for Gaitan, Mr. and Mrs. Gaitan, I believe that the affidavits themselves say they do reside in this area and do say that it was searched, there is authority that if--

The Court: Just one on this Gaitan, if that is the way you pronounce it, does allege the search was made in his apartment, that would be Gaitan's apartment.

Mr. Pfeiffer: That is right.

The Court: The other affidavit alleges on the behalf of Emmett, that it was just the premises and does not allege anything that would indicate it was a dwelling or anything of that sort.

Mr. Pfeiffer: That is right. There is nothing in the affidavits or the motions themselves as to Silva or Emmett which would indicate that they assert any interest in the property taken or any interest in the premises that were searched.

The Court: Well, I mean, as I understand, if the premises involved is a dwelling, comes within that classification, why it is not necessary that the defendant allege the ownership of the items taken and as for their asking for their return and suppression in evidence, on the theory that the search of the residence is not proper and that nothing can be obtained in the way of evidence by that search. However, as to any defendant who isn't in the residential arrangement, why there has to be an allegation of ownership of the item taken before the matter -- before the motion could be granted or considered.

28] Mr. Pfeiffer: That is my understanding of the law, sir.

The Court: What is your position on that?

Mr. Gerash: I speak naturally now only of Silva because it has been conceded by the U. S. attorney that it is the affidavits of Gaitans that are sufficient.

The Court: I didn't hear him concede that.

Mr. Pfeiffer: I am not conceding anything that is in the affidavit, I am just stating that it seems to me that the affidavit and the motion would be sufficient in that respect.

The Court: Well now before you proceed here, let me get straight on this thing. Mr. Lawther has moved on behalf of the defendant Emmett to suppress certain evidence, and the other motion is on behalf of Delores Mary Gaitan and Joseph Aguilar Gaitan. That is right, isn't it?

29] I don't see where Silva has filed a motion at all. Did he file a motion?

Mr. Pfeiffer: I may be mistaken.

Mr. Gerash: Yes, your Honor, and also there is an affidavit on behalf of Silva.

The Court: Well I see a motion here for Silva for relief from prejudicial joinder but I do not see any motion to suppress evidence on behalf of Silva.

Mr. Gerash: He was named with the two Gaitans in that motion, your Honor.

The Court: What?

Mr. Gerash: Silva was named with the Gaitans in the motion to suppress evidence and there were three affidavits attached.

The Court: Well, let's see the motion. I mean, I must not have the file.

Mr. Gerash: This is a copy of that motion, your Honor.

The Court: Where is anything said about Silva? That is what I have here. I say, where is anything said about Silva?

Mr. Gerash: In the motion to suppress?

30] The Court: Yes. I mean, I don't see it.

Mr. Gerash: Well, in the motion to suppress, there is actually no statement therein as to the Gaitans also except the title of the parties involved.

The Court: There may be a question whether you have a motion here or not, but the notice at least doesn't cover Silva, at all. Even if you consider that you are going to make an oral motion, doesn't the rule require that a motion be made in writing and so forth?

Mr. Pfeiffer: Yes, it says that.

The Court: Where is that section about procedure?

Mr. Pfeiffer: Forty one-E.

The Court: Well, it says, may move the District Court but my impression is that the motion has to be in writing, under the decisions.

Mr. Gerash: Your Honor, I wish you could take judicial notice of the fact that three names appear in the motion.

The Court: I cannot take judicial notice of something that is on suspicion. What is there to take judicial notice of?

Mr. Gerash: I just wanted to mention that Emmett's name is not in our motion and, therefore, it is our position that the accompaning affidavit of Silva, Delores Gaitan and Joseph Gaitan support the motion. Perhaps it was a technical oversight not to include in the body of the motion the name of Silva. However, the name of Silva does exist and is clearly set out under the two names of Gaitan in the caption of the motion.

The Court: I don't follow you because there is no Silva affidavit on the motion that I have at all. If there is, if that --

Mr. Gerash: It was filed with the court, your Honor.

The Court: What?

Mr. Gerash: Silva affidavit was filed with the court, and a copy was given to the U.S. Attorney's Office.

The Court: When was it filed?

Mr. Pfeiffer: The only affidavit that I have --

The Court: The only affidavit filed by Silva is in connection with the motion for severance.

Mr. Pfeiffer: That is the same as mine.

The Court: No affidavit filed by Silva. Let me see a copy of any affidavit filed by Silva.

Mr. Gerash: In all probability then our counsel in Colorado Springs only sent in the affidavit regarding the motion to sever for prejudicial joinder.

The Court: My concern is not so much about the affidavit but the lack of any motion on behalf of Silva and possibly on behalf of both Gaitans.

32] Now, Mr. Lawther, in contrast with what you have done, has filed a regular motion here. Now what I am concerned about is whether there is anything to proceed on in this Gaitan matter, even to say nothing of Silva, because there is not

a word or a mention of Silva in anything that I have before me here.

Mr. Gerash: Conceding the fact then that the motion to suppress does not involve Silva, there is a motion before the court regarding motion to suppress naming the Gaitans and their two affidavits.

The Court: Well, as I say, if there was a motion here, I would proceed without necessity of referring to the affidavits on the basis of the testimony but even if you take this notice, you have labeled it "Motion to Suppress Evidence," why Silva is not mentioned in that motion.

Mr.Gerash: No, Silva is not mentioned in the motion but the Gaitans are, your Honor.

The Court: Well, I expect you will have to proceed on the basis that Silva isn't moving to suppress evidence. But, Mr. Pfeiffer, I think what they call Motion to Suppress here may be sufficient motion to raise a question as to Gaitan, the two Gaitans. What do you think about that?

Mr. Pfeiffer: Well, that is true, I think. As I read the motion, it says, "take notice that a motion will be filed on a certain day in March."

33] The Court: Well, that is what I say, I doubt if it is a motion.

Mr. Pfeiffer: It is not a motion.

The Court: I think probably with respect to them, that there is nothing that can be done now and if you wish to file motions why, of course, we will set them down and hear them.

When is this case set on the calendar?

Mr. Pfeiffer: Set on the calendar for April -- the week of April the 8th. If counsel, as to the Gaitans, if he will state his motion orally, we would just as soon dispose of the matter now so that there won't be any delay in this trial setting, if the Court is inclined to deny their motion to suppress. His grounds for the motion, if he will state them now, we will be prepared to go.

The Court: I think we will do that, if you want to make a motion for the record. The rule says, "May make a motion," may move the District Court for return of the property and suppress the evidence and so forth. The rule itself does not say whether the motion has to be in writing or whether it may be made otherwise, but since this matter is set down on the basis of what was filed here, I think under the circumstances we may go ahead and consider an oral motion although I think the practice requires that the motion be made in writing but you may go ahead and make your motion.

34] Mr. Gerash: All right. Then we would like to make the following motion:

That we feel that the evidence held by the Government was produced through unreasonable, illegal, and void search and seizure made by the federal authorities and agents of the Bureau of Narcotics and move that such motion -- strike that - move that such evidence be suppressed.

The Court: What is the evidence you are talking about? What is it you are talking about that was seized?

Mr. Gerash: Well, therein as to the evidence, there were various personal items of personal property.

The Court: I think one of the requirements of any motion is that the property be described so that if you can do that, if you will state what it is, because the Court has to know what it is you claim was illegally seized.

Mr. Gerash: An amount of personal property, namely a camera and also five pounds and 14 ounces of bulk marijuana.

The Court: On whose behalf do you make this motion?

Mr. Gerash: -- also personal letters belonging to Delores and Mary Gaitan and any and all property located therein in the --

35] The Court: Well, on whose behalf do you make the motion now?

Mr. Gerash: On behalf of Joseph Gaitan and Delores Mary Gaitan.

The Court: And not Silva?

Mr. Gerash: No, your Honor -- and Silva.

The Court: Let's get together on something here. Are you making a motion now on behalf of all three defendants? Delores Gaitan and Mary Gaitan and Joseph Aguilar Gaitan, and Silva?

Mr. Gerash: Yes. The basis of this motion is made under the Federal Rules of Criminal Procedure, Rule 41 (e) and also it should be stated and alleged that the residence wherein the illegal search and seizure took place is the residence of Delores Mary Gaitan and Joseph Aguilar Gaitan and that Silva was a guest therein.

The Court: Do you know of any statute or any rule or any decision that would give Mr. Silva the right to suppression of the evidence unless he alleged that he was the owner and the proof shows that he was the owner?

Mr. Gerash: Yes, your Honor.

The Court: Let's see something like that.

Mr. Gerash: I cite the case of United States versus Amoia, 91 Federal Supplement,223. In that case, your Honor, basically the policeman entered the premises and opened the door and discovered a still in the basement.

36] The Court: Well, I mean, let's get to the point. The point I am interested in is whether in the case of Mr. Silva you are taking your own statement for being the fact, was not the owner or occupant of the premises? I think the cases hold and I want to know if you have anything to the contrary that in that event that Mr. -- in that situation, that Mr. Silva has to allege and prove that the items seized were his property before there can be a suppression or return of the property. I think there is a legend of cases on it.

Mr. Gerash: There is, your Honor, but this case held that the Government's contention in argument that there was no ownership of the goods since the goods were in the defendant's private home.

The Court: Well, I am having a great deal of difficulty, Mr. Gerash, in explaining to you what I think the law is. What I want you to advise the Court is, if you have any authority on it. As I understand your own statement to be to the Court that Mr. Silva was neither the owner of the premises involved here, this 18 -- whatever it is -- 31 Williams Street, nor was he a tennant of any property there.

37] I am asking you what authority you have to show that we can even consider this motion to suppress unless it is alleged and proved that he was the owner of the property taken.

Now with respect to the -- to a person owning a dwelling house, the rule is different, but with respect to an individual who was neither the owner or the occupant in lawful possession of the property as his home, as a dwelling, why I think the law is that they cannot ask for a suppression of the evidence unless they allege and prove that they are the owners or the property seized. And so, therefore, the question posed is: How, on your own statement, could there be any relief granted with respect to Silva?

Mr. Gerash: Well, your Honor, the basis of the fact is that since we allege that Silva had residency in the house as a guest, we feel that on the basis of the Amoia case wherein they stated that no ownership --

The Court: What are the facts of the Amoia Case? That was the owner of the property, wasn't it, or the owner of the premises?

Mr. Gerash: He was the -- It was his private home.

The Court: What I am asking you, did you have any cases that supports the notion that somebody casually in a house, something like that, is entitled to suppression unless he alleges that the property belonged to him?

38] Mr. Gerash: No, your Honor. However, it is our -- definitely our position, we feel that since Silva was in the house and he had his personal belongings in the house, therefore, no ownership allegation is necessary to be made as to him --

The Court: I am just asking you if you have any cases that

hold that?

Mr. Gerash: No, your Honor, no cases on that point.

The Court: I think there is a multitude of them the other way, isn't there, Mr. Pfeiffer?

Mr. Pfeiffer: That is correct, sir. I will find one here.

The Court: I don't know what the relationship was. I expect you better hear the evidence and go ahead with the argument on the thing, in light of this motion and in light of what has been said here and in the light of this allegation that this property was the apartment or something and we better proceed here with the evidence and then determine it on the basis of the evidence rather than to suppress the evidence.

Mr. Pfeiffer: For the purposes of the record, I think that if there is an allegation that this residence is Silva's, that the motion should stand and we should find out what the fact is.

39] The Court: Well, I say, if that is what he is contending, I will hear the evidence and then we will see what we do then. You can be sworn.

MATHEW J. GRESS having been duly sworn to state the truth, the whole truth, and nothing but the truth, upon his corporal oath testified as follows:

Direct Examination By Mr. Gerash:

Q. Please state your name. A. Mathew J. Gress.
Q. Where is your home? A. Denver, Colorado.
Q. Where were you on the night of the 5th of February, 1957? A. At what particular time?
Q. Well, I direct your attention to the afternoon of that day. A. I believe I was working that day at the office.
Q. And then thereafter, in the evening, did you have any occasion to receive a phone call? A. I did.

* * * * *

Q. (By Mr. Gerash) Now regarding that phone call, what did you do after that? Do you know who you talked to on the phone? A. At approximately 9:35, yes, p.m.

Q. Who was that? A. Detective Borden.

Q. Are you acquainted with Detective Borden?

A. I am.

Q. Who is Detective Borden? A. He is a Detective Sergeant with the Intelligence Unit, Denver Police Department.

Q. What did you do after that? A. After his phone call, I called Agent Ford.

Q. And then what did you do? A. And I drove to 1831 Williams Street, Denver, Colorado.

Q. Did you have a warrant of arrest at that time in your possession? A. No, sir.

41] Q. Did you have a search warrant on your possession at that time? A. No, sir.

Q. Now you proceeded to go into the premises?

A. I did.

Q. In what manner did you proceed through the premises?

A. I went to the front door.

Q. And then you walked in through the front door?

A. Yes, sir.

Q. And then did you proceed down into the Gaitan's apartment? A. Down to the basement apartment.

Q. Did you knock at the door? A. No, sir, I believe the door --

Q. Did you have the permission of the Gaitans to go down there? A. No, sir.

Q. Do you know what you were going down there for in the first place? A. I knew why I was called.

Q. What was your mission in going down there?

42] A. I was called by --

* * * * *

The Witness: I was told by Detective Borden that he was at the Gaitan residence and that he had defendant Gaitan under arrest and that there was a quantity of marijuana found in the apartment.

Q. (By Mr. Gerash) Did he state to you that -- if I understand you correctly -- that he was under arrest?

A. They had him there.

Q. He had him there? A. Yes.

Q. But he didn't state he was under arrest?
A. He didn't state those words; no.
Q. Now, as you proceeded down into the apartment, what did you see when you were there?
A. When I entered the apartment, I saw defendant Gaitan and his wife, Delores Mary Gaitan. They were sitting down in the living room-bedroom combined there, and Captain Nelson of the Intelligence Division was standing there and also Detective Nilson.
Q. Nelson and Nelson, did you say?
43] A. One is spelled with a N-i-l and one N-e-l.
Q. That is the way you spell it?
A. Yes.
Q. Did you look around? A. Just --

The Court: He is not under cross examination. You can ask him what he did and things like that. This is direct examination.

Mr. Gerash: Your Honor, couldn't it be possible to constrew the person on the stand as an adverse witness?

The Court: No, no. There is no such a rule. You should know that. There is nothing to base that on, no showing made here under the rules or under the practice at all. If a witness appears from his testimony, for instance, if he gives inconsistent testimony and you call that to the Court's attention, you have the right then to cross examine him because it is apparent animosity. But there is no way of calling a Government representative as an adverse witness in a proceeding like this, or a civil case at all. So you may proceed with your examination.

Q. (By Mr. Gerash) Now, did you look around the premises?
A. Yes.
44] Q. Pretty thoroughly? A. You mean did I search the premises?
Q. I said, did you walk around the premises?
A. No, I didn't.
Q. You just stood there? A. I just stood there and looked around the apartment. I spoke to the defendant and that was about all.
Q. What did you say to the defendant? A. I spoke to him, I says, "Hi, Gaitan."
Q. You know him before? A. Yes, I did.

Q. Did you have any communication previously concerning the Gaitans with Borden, Nelson and Nilson?

Mr. Pfeiffer: If it please the Court, I think it is an awful general question.

The Court: I cannot see any possible theory that you can ask about conversations unless they were in the presence of Gaitan.

Q. (By Mr. Gerash) In the presence of Gaitan, then, did you discuss aspects of the case with anybody?
A. On this particular night?
Q. Yes. A. Well, I spoke to Captain Nelson and I asked Captain Nelson where he found -- he showed me the marijuana.
Q. Then did you open up the package and look in there?
45] A. He had the package in his hand, he opened it up and showed it to me.
Q. But you looked in there? A. I looked in the package; yes.
Q. Where else did you look? A. He opened --

The Court: Where else did he look? I didn't know he looked anywhere. He said the Captain had this package and he looked at the package.

Mr. Gerash: He stated previously, your Honor, that he looked around.

The Court: Well, he said he stood there in the room, glanced around. I don't know that that would be looking anyplace, so let's go along with something.

Q. (By Mr. Gerash) Did you look at any other specific place in the premises? A. Yes. Captain Nelson called my attention to the closet or the doors in the wall behind where he found the marijuana.
Q. Was that door part of the apartment or not?
A. Well, it is in the apartment.
Q. Was it recessed in the wall? A. Right on the wall. I wouldn't say --
Q. Right on. Now, did you ever produce a warrant of arrest for the Gaitans? A. No, sir.
Q. Did you ever have -- also you never had a search warrant at that time? A. That is right.

Q. In other words, then you didn't have permission to go on the Gaitan premises?

The Court: Well, that calls for a conclusion.

Q. (By Mr. Gerash) Did you have the permission of the Gaitans to go on the premises?

The Court: He has answered the question that he didn't, once before. He didn't have the permission.

Mr. Gerash: All right.

Q. (By Mr. Gerash) Do you know if the Gaitans were ever arrested by the Federal Authorities?
A. You mean subsequent to this time?
Q. Yes, to your own personal knowledge.
A. Not to my personal knowledge.

* * * * *

47] Q. (By Mr. Gerash) Did you tag by any initial identification, any of the items in the Gaitan apartment?
A. At that time? While I was in the Gaitan apartment, no.
Q. Did you have any communications with the Police Authorities previous to the time, other than the time you stated regarding the Gaitan's apartment?
A. No, sir.
Q. Did Mr. Gaitan ask you, "Do you have a warrant for my arrest?" A. He did not.
Q. Did he ask you if you had a search warrant when you came into his house? A. No, sir.

* * * * *

Q. (By Mr. Gerash) Now did you join the Gaitans at all in a Police car? A. I rode with them to the Police Department.
Q. What was your -- Did you have any reason for that?
48] A. No.

Mr. Pfeiffer: As far as reasons are concerned, we would just like to know what happened here.

The Court: Well, I think he may answer that question. Go ahead.

The Witness: I had no particular reason unless it was one of custody, and assisting Captain Nelson to take him to the Police Department.

Q. (By Mr. Gerash) Were these goods ever -- Did these goods ever end up in your possession at all?
A. The goods seized at the Gaitan residence?
Q. Right. A. No, sir.
Q. Therefore, to the best of your knowledge, they are still in the hands of the Police Authorities?

* * * * *

Q. (By Mr. Gerash) Did you ever call the Police Department that evening? A. No, sir.
49] Q. But the Police Department did call you at 9:35?
A. Detective Borden called me at 9:35.
Q. Up to that phone call, you didn't know anything about the case at all previously or -- A. That is right.
Q. But you did know Mr. Gaitan before?
A. I did.
Q. Agent Gress, do you know where the marijuana is at the present time? A. Well, I know where it is. I wasn't there when it was put in. It is in the vault at the Narcotic Bureau.
Q. Did you put it there? A. No, sir; I did not.
Q. Were any other Federal Agents there on the premises?
A. On that particular night?
Q. Yes. A. Yes; Agent Ford was there.
Q. Did you have conversation with Agent Ford regarding the entry of the premises?

* * * * *

50] Q. (By Mr. Gerash) Did you walk through the door of the Gaitan apartment? A. I did.

* * * * *

Q. (By Mr. Gerash) Your sole purpose of going down there was on the basis of this phone call that you received

from the Police Authorities. Is that correct?
A. That was my purpose for going down there; that is right.
Q. Did you also have probable cause to arrest the Gaitans because a felony was being committed therein?
A. I didn't arrest the Gaitans.
51] Q. Pardon? A. I didn't arrest the Gaitans.

* * * * *

Q. Was there marijuana there? A. I saw the package that Captain Nelson showed to me.
Q. Did you open up, to look in, to see what was in there?

52] Mr. Pfeiffer: I believe it has been established that he -- Captain Nelson opened it up.

The Court: He has already testified and this isn't cross examination. I reiterate, the witness testified about that already, that he looked at it and that the Captain showed it to him or words to that effect. That is what you said, wasn't it?

The Witness: Yes, sir; that is right.

Mr. Gerash: Then we'd like to save an exception regarding the limitation of a mere direct examination on the basis --

The Court: If you will show me some authority -- that is so elemental -- I am amazed that anyone would stand here and advise the Court otherwise. If you will just show me some intimation of the authority that would give you the right to cross examination of a witness you called yourself. You called this witness.

Mr. Gerash: Yes, your Honor, but the reason that we call the witness is because we represent the defendant and the defendant's constitutional rights we allege have been violated.

The Court: But I say, there is no authority that gives you the right to cross examine the witness unless you show by something that he has done to be an adverse witness and I haven't heard any testimony along that line at all
53] that would indicate that the witness is adverse or anything

else from doing anything other than trying to tell a true story of what happened and your questions are all based or a lot of them based on an absolute assumption that is not born out by this witness's testimony. The witness has a right to have the questions at least based on some premise that is consistent with his testimony. So go ahead.

Mr. Gerash: All right.

* * * * *

Cross Examination By Mr. Pfeiffer:

54] Q. Where are you employed? A. U. S. Treasury Department, Bureau of Narcotics, Denver, Colorado.

Q. You are a narcotic agent, you work for the United States Government? A. I do.

Q. Were you on duty this evening? A. Well, I was called. I am on duty all the time.

Q. Where were you at the time of the call?

55] A. At my home.

Q. Now, did you place -- this evening, did you place the Gaitans or anybody under arrest? A. I did not.

Q. Did you this evening obtain anything from the Police Department at all? A. No, sir.

Q. That was alleged to have come from this apartment?

A. No, sir.

JOSEPH AGUILAR GAITAN having been duly sworn to state the truth, the whole truth, and nothing but the truth, upon his corporal oath testified as follows:

Direct Examination By Mr. Gerash:

Q. Please state your name. A. Joseph Aguilar Gaitan.

56] Q. Are you one of the defendants in this action?

A. Yes, I am.

Q. Where was your residence on the night of February 5th, 1957?

The Court: Where was what?

Mr. Gerash: Residence.

The Witness: 1831 Williams, basement apartment.

Q. (By Mr. Gerash) Are you married? A. Yes, I am.
Q. What is your wife's name? A. Delores Mary Gaitan.
Q. Does she reside at that same address?
A. She did reside there at that time.
Q. That is on the night of February 5th, 1957?
A. Yes, sir.
Q. Now when were you first -- When did you first realize that -- Strike that.

What happened that evening, what was the first incident that was unusual, different than any other night?
A. Well, I heard a knock on my door upstairs that leads to my apartment. And I went up to answer it and I let in the door Mr. Wayne Blendley and as I turned around to go down stairs, Mr. Nelson and Mr. Borden and another gentleman that is here, I can't think of his name, they belong to the Intelligence Bureau, they put a gun at my head and told me not to turn around and keep on going down to my apartment.
57] Q. Are they State Officials, State Officers or Federal Officers? A. They were State Officials.
Q. Then what happened? A. Well, when -- as they went in the kitchen, my wife was in there with another friend of hers and they put the gun on her, too, and walked her into the living room and bedroom combined.
Q. Did they say that you are under arrest?
A. No, they didn't.

The Court: Let him say what they said.

Q. (By Mr. Gerash) Did they say anything when they first came in? A. No. They just told me to sit down and keep my mouth shut and put the gun on me, that is all they told me.
Q. And then what did they proceed to do?
A. They started searching the apartment, my kitchen, and the room outside my apartment which we had access to, and at that point I asked Mr. Nelson for a search warrant and he said he didn't need any. And --
Q. I didn't understand. Said what?
A. I asked Mr. Nelson for his search warrant and he made the statement that he didn't need one.

58] Q. That he needed one or didn't?

* * * * *

The Witness: That he didn't need one.

Q. (By Mr. Gerash) And then what happened?

A. Well, they proceeded to search the apartment thoroughly and they found a bag in this -- it isn't a closet, it isn't a room, it is just a door that is there to go into the gas and light meter, it is not used for anything specific. They found that bag there which they claim was marijuana. That is about --

Q. Would you consider this alcove in your apartment?

A. No, I wouldn't. I don't live in it. I didn't live in it at the time. Well, only one that opened that door was the meterman.

Q. Now when did you first -- Did you at all that evening see Agent Gress who previously testified?

A. Yes, I did.

Q. How did you first see him? A. He walked into my apartment.

Q. Did he have your permission? A. No, he didn't. I asked him for a search warrant. He didn't answer me at all.

Q. Did he place you under arrest?

59] A. Well, in fact I didn't know I was under arrest until they took me to the Police Department, until they started taking us out.

Q. Who took you to the Police Department?

A. Mr. Gress, Mr. Nelson and another gentleman. I can't recall his name but he was here a while ago.

Q. Can you describe what Mr. Gress did when he came down into your apartment? A. Well, he -- when he first went down there, he talked to Mr. Nelson and they discussed the bag. They both looked into the bag, they opened this little door and they both looked in there and they both looked in the closet and I don't know what he done in the kitchen, Mr. Borden was in the kitchen, because they wouldn't let us --

Q. You say Mr. Gress went into the kitchen, too?

A. Mr. Borden, I believe, Mr. Borden was in the kitchen but they wouldn't let us move from where we were at so I couldn't be certain.

Q. What did Mr. Gress say to you at any time?

A. Well, he just -- He asked me if the marijuana was

mine. I told him it wasn't; and whose it was, and I told him I'd rather not talk to him until I had a chance to talk to my attorney. And again, in the car, he started to talk to me again, and I told him the same thing again. Him and Mr. Nelson both, they were --

60] Q. When you said that he looked at the marijuana, did he inspect it by physically holding it?

A. Well, both he and Mr. Nelson held the bag and looked into it at the same time.

Q. Did he take any samples therein?

A. No, not that I recall.

Q. You stated -- Did he look anywhere else other than the places that you have stated?

A. No. I am pretty sure he didn't. Just glanced around the room and walked around the room. That is all he done.

Q. Was he looking? A. Well, I guess, his eyes were open.

Q. Did you see anybody take the marijuana from the house?

A. Who actually walked out with it, I really couldn't say who actually walked out with it.

Q. Did you give any of the State Officials permission to come into your apartment? A. No, I didn't.

Q. Did they show any warrant? A. Only thing they showed me was a gun.

61] Q. Did Agent Gress identify himself to you?

A. Yes, he did.

Q. What did he say? A. Well, he pulled out his billfold and he showed me that he was a United States Agent.

Q. And the only questions that he asked you were the ones that you stated? A. Uh huh.

Q. And the only answers that he gave to you were concerning your questions of what?

A. I asked him for his search warrant, he didn't answer me at all. And then when he started asking me who the marijuana belonged to why at that time I told him --

The Court: You went over that once.

The Witness: -- that I wouldn't say anything until I talked to my attorney.

Q. (By Mr. Gerash) Do you know to the best of your knowledge what property was seized on the premises?

A. Yes, it was a camera, some personal letters, some receipts

and I can't quite recall all the items; was various items.

The Court: You said of his personal knowledge, I mean, best personal knowledge. Does he know that that was taken or is this an estimate or what is it?

62] Q. (By Mr. Gerash) You know if these things were taken?
A. I know definitely that they were taken.
Q. Did you see them taken or you know they were missing?
A. Well, Mr. Nelson, himself, told me he took them.

The Court: Who took them?

The Witness: Mr. Nelson.

Q. (By Mr. Gerash) Do you know if Agent Gress took any marijuana? A. No, outside of the fact that he looked at it in the apartment and handled the bag, that is all. I can't say he took any.
Q. Do you know for a fact that your telephone was wire tapped? A. No, I don't.

The Court: Let's find out first whether it wasn't. You can ask him whether it was or wasn't.

Q. (By Mr. Gerash) Do you know whether or not your phone was wire tapped? A. No, I don't.
Q. What is your phone number? A. It was Dudley 8-3536.

Mr. Gerash: That is all.

63] Cross Examination By Mr. Pfeiffer:

Q. I believe you stated that you heard a knock on the door and you came upstairs and you opened the door, and you let a Wayne Blendley in? A. Wayne Blendley.
Q. What did Wayne Blendley do after this?
A. He went down stairs when they put the guns on us, he went down stairs with me.
Q. He went down stairs with you. Prior to that time, did Mr. Silva and Mr. Emmett leave your apartment? Just a few minutes before that time?
A. Just a what?

Q. Just a few minutes before you went upstairs, did Mr. Silva and Emmett leave your apartment?
A. No, they didn't.
Q. They weren't down in your apartment; is that right?
A. Not a few minutes before that.
Q. Were they in your apartment that night?
A. Yes, they were.

* * * * *

64] Q. (By Mr. Pfeiffer) About how long before?
A. They weren't there before, they were there after.
Q. They came after? A. Uh huh.

* * * * *

65] Q. (By Mr. Pfeiffer) You say during the time that Officer -- this Captain Nelson, isn't it?
A. I believe it is Captain Nelson.
Q. And was Dwayne Borden down there -- Mr. Borden?
A. Uh huh.
Q. Officer Borden. Who was all down there at that time? I will ask you: Was Emmett down there then?
A. Yes, they brought him down.
Q. Was Silva down there then?
A. They brought him down.
Q. Your wife was down there? A. She was.
Q. Yourself was down there and how many Officers were down there? A. Mr. Nelson, Mr. Borden, and three others whose names I don't know.
Q. All right now, you do know Mathew Gress, you know John Marsh and you know Jim Ford. A. Uh huh.
Q. Now were they down there at the time when they walked you into the room? A. No, not when they walked in the room.
Q. They weren't in there at that time? A. No.
66] Q. Then as I understand it, Captain Nelson or someone found this bag? A. Yes, sir.
Q. In a little door? A. Yes, sir.
Q. Now that is above the crib, isn't it, the crib was there? A. Yes.
Q. And they moved the crib out, went over and you had a door that had a picture of a girl on it?
A. Uh huh.
Q. You opened up the door -- they opened up the door and

found this sack back there. Now, what is that back there?
A. It is just -- Well, more or less the foundation of the apartment house itself and there is gas and light meter there.
Q. Is that yours? A. No, it isn't.
Q. You occupy that back there, do you ever use it?
A. No, I didn't.
Q. Don't use it at all. Is that sack yours, that marijuana sack? A. No, sir.
67] Q. That marijuana wasn't yours at all? A. No, sir.
Q. Now you say that your phone number is Dudley 8-3536?
A. Yes, sir.
Q. How long have you had that phone number?
A. Oh, just from about November on to February the 5th.
Q. You had it from November of 1956?
A. Just about, more or less around that time.
Q. Who paid the bill for that phone? A. My wife.
Q. Was it you and your wife, was it in your name or your wife's name? A. My wife's name.
Q. Was in your wife's name; is that right?
A. Yes.
Q. You used the phone though, didn't you?
A. Yes.

Mr. Pfeiffer: I have no further questions.

Redirect Examination By Mr. Gerash:

Q. Do you know Edward Walroff? A. Yes, I do.
Q. Did you see him any time during that evening?
A. Yes, I did.
Q. When? A. Well, he knocked at my -- not knocked.
68] I saw him when they brought him down into my apartment. Mr. Borden and Mr. Nelson. They brought him down to my apartment. From what I understand, he was going there to see me and they also arrested him.

The Court: You just testify to what you know and saw.

The Witness: Well, I saw him that night.

Q. (By Mr. Gerash) Did you ever see him in the presence of any of the Federal Agents? A. Yes, I believe he -- Mr. Gress took him to the Police Department, I think.

Q. Did you see that? A. No, I didn't see the actual --
Q. Then don't testify to that. Now when the alleged marijuana was taken out of the -- how would you term it, the trap door leading to the under foundations of the house, was that thereafter placed in the house? In other words, was it kept in the door all the time or was it also brought out into the -- into your room? A. No, it was brought into my room when Mr. Nelson found it.
Q. Therefore, it was in your premises then after that?
A. After Mr. Nelson --
69] Q. I see; just in summary, you stated previously --

The Court: You need not summarize.

Mr. Gerash: I just wanted to clarify.

The Court: You can ask him any question but he has been over several things two or three times.

Q. (By Mr. Gerash) Did you say previously that no warrant for arrest was shown?

The Court: You stated that three times at least or maybe four times and I guess no one contends there was. Isn't that right, Mr. Pfeiffer?

Mr. Pfeiffer: That is correct, sir.

The Witness: Is that all?

Mr. Gerash: That is all.

Mr. Gerash: Mr. Borden.

Mr. Pfeiffer: If it please the Court, at this time we will move to dispense with this because Mr. Gaitan himself has stated on the stand that the marijuana was not his, it was found up there, nor was it found in his premises. On his own statement, I do not believe they have alleged grounds sufficient here to show --

The Court: Well, I think that is probably right but I don't know what they are going to. You may go ahead with the testimony.

70] DWAYNE L. BORDEN having been duly sworn to state the truth, the whole truth, and nothing but the truth, upon his corporal oath testified as follows:

Direct Examination By Mr. Gerash:

Q. Will you please state your name? A. Dwayne L. Borden.
Q. Where are you employed? A. Police Department, City and County of Denver.
Q. Did you have occasion to make a phone call on the night of February the 5th, 1957? A. Yes, I did.
Q. Who was it to? A. I talked -- made two phone calls. First was to try and reach Mr. Marsh. Second was to Mr. Gress.
Q. What did you say? A. I told him we had seized a quantity of marijuana.
Q. Did you say who it belonged to?
A. I don't think I made any statement.

The Court: As I say, the conversation isn't proper. He can say what he reported.

Q. (By Mr. Gerash) State what you --
A. I don't recall whether I told him --

* * * * *

71] Q. (By Mr. Gerash) All right. Did you state where the marijuana was found? A. I told him we found this quantity of marijuana at 1831 Williams in the basement.
Q. Then thereafter, did you proceed to the, or did you call from the Gaitan apartment? A. Yes, I did.
Q. I see, and then did you see any Federal Agents in the apartment thereafter? A. Yes, I did.
Q. Who did you see? A. Saw Agent Gress and Agent Ford.
Q. Were they in the presence of the defendant?
A. I think they were.
Q. Did they have permission of the occupant to enter?

The Court: Now how does he know?

Q. (By Mr. Gerash) Was there any conversation --

The Court: Mr. Gress testified he didn't, so what is the use of going into that?

Mr. Gerash: All right.

Q. (By Mr. Gerash) Now did Mr. Gress have conversation at all with you in the apartment?

72] The Court: It would have to be in the presence of the defendant.

Q. (By Mr. Gerash) In the presence of the defendant?
A. I don't recall whether he did or not. I seen him there.
Q. Did he examine the bulk marijuana package?
A. Not to my knowledge.
Q. Pardon? A. Not to my knowledge.
Q. Not to your knowledge. Did you have any previous contact with the Federal Authorities regarding the Gaitan premises? A. No, sir.
Q. Not at all? A. That is correct.
Q. In other words, the first contact you had --

The Court: He has answered the question, You need not argue with him. He has answered it twice so let's leave it there. Proceed.

Q. (By Mr. Gerash) In Gaitan's presence, did you hear the defendant -- did you hear any conversation take place between Agent Gress and any of the Gaitans?
A. I don't remember any; no, sir.
Q. You don't remember. Did you have a warrant of arrest?
A. No, sir.
73] Q. Did you have a search warrant? A. No, sir.
Q. Did you have the acquaintance of Agent Ford and Agent Gress previous to the entire proceedings that we are talking about now?

Mr. Pfeiffer: I don't see the relevancy of that.

The Court: What was the question, I didn't hear it.

Mr. Pfeiffer: As to whether he had an acquaintance with these people.

The Court: Well, he can answer it. I don't see how relevant it is.

The Witness: I have been acquainted with them for several years.

Q. (By Mr. Gerash) Were you acquainted with them regarding Joseph Gaitan and any similar incident?
A. In regards to this particular incident and night also?
Q. No. A. No, sir; no, sir.
Q. Now, regarding to this particular incident --

The Court: What are you asking him?

Mr. Gerash: I wanted to know regarding this particular incident --

74] The Court: He has told you twice that he didn't have any contact with either one of them before this telephone or these telephone calls on that day with respect to this matter.

Q. (By Mr. Gerash) Did you accompany Agent Gress and the Gaitans in the Police car back to the Police Headquarters? A. No, sir.
Q. Did you give any marijuana to Agent Gress or Agent Ford? A. No, sir.
Q. Did you give a camera or papers to Agent Gress or Agent Ford? A. No, sir.

Mr. Gerash: That is all.

Cross Examination By Mr. Pfeiffer:

Q. Just prior to going down to the basement, you placed two men under arrest, did you not? A. That is correct.
Q. That was Mr. Emmett and Mr. Silva?
A. Aniseto Silva and Joseph Anthony Emmett.
75] Q. Then did you remove anything from either one of those people? A. I took a tin of marijuana out of the inside coat pocket of Emmett.
Q. Of Emmett. Now then, what did you do with that, that tin? A. I put it in my suit pocket.
Q. What did you do with it that evening?
A. Turned it over to Captain Nelson, Intelligence Division.

Q. Captain Nelson, is he your Chief or --
A. He is the Bureau Supervisor.
Q. Now were you present when the bag was found?
A. No, sir.
Q. Could you state whether -- Did you have knowledge that it was found? A. Yes, I did.
Q. Could you state whether Jim Ford and Mathew Gress -- Agent Gress and Agent Ford came down to that apartment before or after that? A. They came down upon being summoned by me, that is Mr. Gress did. I don't know where Agent Ford came in on the picture.
Q. Now did Agent Gress come before or after the sack was found? A. After.

76] Redirect Examination By Mr. Gerash:

Q. Did you have any conversation with any Federal Authorities concerning any of the defendants that evening other than the phone call?

* * * * *

Q. (By Mr. Gerash) At any time that evening, of the evening of February 5th. A. I placed a call, I don't know, on or about 9:30, to Mr. Gress.
Q. From the time period of 6:00 p.m. that evening to 9:30, did you have any conversation with any Federal Authorities concerning any of the defendants? A. No, sir.

The Court: I guess you can step down.

77] WALTER G. NELSON having been duly sworn to state the truth, the whole truth, and nothing but the truth, upon his corporal oath testified as follows:

Direct Examination By Mr. Gerash:

Q. Will you please state your name? A. Walter G. Nelson.
Q. Where are you employed, Mr. Nelson?
A. Captain of Police, City and County of Denver.
Q. Were you so employed on the night of February 5th, 1957? A. I was.

Q. Did you have an occasion to enter the premises of the Gaitans? A. That evening, I did.

Q. Did you have a warrant? A. I did not.

Q. Did you have a search warrant? A. I did not.

Q. Did you place anybody under arrest?

A. I did.

Q. When? A. When I entered the apartment, Mr. Gaitan was quoting the law and I told him at that time -- he wanted to talk to his attorney. I told Mr. Gaitan at that time that he was under arrest, that when he was taken down to Police Headquarters he would be allowed to contact his attorney.

Q. But you definitely -- you stated that he was under --

A. I definitely stated that.

Q. Did you make any phone call that evening as soon as you -- as you stated -- you arrested Mr. Gaitan, to any Federal Authorities? A. I did not.

Q. Did any other Police Officer in the presence of the defendant and in your presence make such a call?

A. Sergeant Borden called Agent Gress.

Q. I see. At what time, approximately?

A. Well, the time, as I recall it, our investigation was all complete, we had obtained everything and I would say approximately 9:30 or thereabouts.

Q. Did Agent Gress enter on his own or did anybody admit him?

A. The doors were open to the apartment and how Agent Gress came down to the door of the apartment, I have no knowledge.

Q. Did he leave the door open?

A. I did not leave the door open; no, sir.

Q. Did you have any conversations with Agent Gress

79] on the premises in the presence of the defendant?

A. The only conversation that I had with Agent Gress, I had the bag of marijuana which was actually two bags, a large shopping bag which was open at the top and full of marijuana to within an inch of the top, and then a smaller, approximately a one-pound bag which was full of marijuana and put shut, and at that time Agent Gress came in. I was finished initialing and was sitting on the bed with the marijuana

in my possession and I held the marijuana, held it down so he could look into the top of the bag.

Q. Did he place his hands on it when he looked in?

A. To the best of my knowledge, he did not.

Q. Did he take any samples? A. He did not.

Q. But you eventually gave the marijuana to the Federal Authorities? A. That is correct.

Q. When did you give the marijuana to them?

A. As I recall it, it was the following day after they agreed to adopt the case.

Q. Who did you give it to? A. Agent Marsh.

Q. Is Agent Marsh present? A. Yes.

80] Q. Did you give the marijuana to any Federal Agents, or any part of the marijuana, that evening?

A. I did not.

Q. Did you, with any Federal Authorities that evening, namely with Ford or with Agent Marsh or Gress, conduct them on a tour of the premises? A. I did not conduct any tours with anybody.

Q. But Agent Gress did look around, didn't he?

A. He was standing in the middle of the room, and by observation, could see all parts of the room.

Q. Did he look into any other items other than the marijuana sack? A. Not to my knowledge.

Q. Did he look into the tin can that Sergeant Borden appropriated? A. Not to my knowledge.

Q. Would you say that the premises involved here are at 1831 Williams Street, City and County of Denver?

A. That is correct.

* * * * *

81] Q. (By Mr. Gerash) Would you say that the marijuana was in Gaitan's apartment? A. I would say it was in the premises under his control.

* * * * *

82] Q. (By Mr. Gerash) Did you seize the marijuana that night?

A. Did I seize the marijuana that night?

Q. Yes. A. I did.

Q. What did you do with it? A. I retained it in my

83] possession until we went back into the office. At that time, it was approximately midnight. I locked it in a

large drawer in my desk to which I have the only key. I took it out the next day at which time I turned it over to Agent Marsh.

Q. Agent Marsh, is he a Federal Official?

A. Agent Marsh is a member of the Federal Narcotics Bureau. It was turned over to be evidence in this trial in Federal Court.

* * * * *

84] Cross Examination By Mr. Pfeiffer:

Q. This was all done under your supervision, is that correct? A. That is correct.

Q. After you placed the people under arrest, were they subsequently taken down to the City Jail?

A. They were.

Q. And were they lodged in the City Jail over night?

A. They were.

Q. And under whose authority? A. Under the authority of the City and County of Denver, the Denver Police Department.

Q. Now, do you know -- do you know of your own knowledge when they were released from City authority to Federal authority? A. They were not released. I made a change of charge slip at which time I put on a hold for Federal Narcotics and that was not made until several days later.

Q. Well, I don't know whether you can testify -- were
85] there any legal proceedings instituted over there?

A. There were.

Q. Do you know this of your own knowledge?

A. I know that of my own knowledge.

Q. What were they? A. It was a writ of habeas corpus for the release of all of the people who were arrested there and some, two at least, had already been released. The rest were taken over to the District Court at which time a hearing was set up for a Saturday morning, the hearing was never consummated as charges were filed on all of the individuals concerned.

Q. Now, to your knowledge, would you state whether or not there was an agreement between your office and the Narcotic Bureau here in Denver as to if you folks should apprehend the Gaitans that the Federal Government would take the case, prior to your entering these premises? A. Absolutely not. It was several days or at least the following day, towards late afternoon, or noon, before any evidence was turned over to the

Federal Authorities or they even made an appearance into the case, and there was no prior agreement at any time whatsoever.

Q. Now, did you -- you say you turned the sack over, did you turn other things over? A. I did not.

Q. They were not in your custody; is that correct?

86] A. They were in my custody, but they were not turned over to the Federal Narcotic Agents.

Q. They were not? A. They were not.

Q. You know where they are now? A. Yes.

Q. Where? A. In the Police Department, City and County of Denver.

Q. You still have them? A. We still have them.

DOLORES MARY GAITAN, having been duly sworn to state the truth, the whole truth, and nothing but the truth, upon her corporal oath testified as follows:

Direct Examination By Mr. Gerash:

Q. State your name. A. Dolores Mary Gaitan.

87] Q. Are you married? A. Yes.

Q. You have any children? A. Yes.

Q. How many? A. I have three.

Q. Directing your attention to the night of February 5th, 1957, did anything happen unusual other than to indicate some difference other than any other night?

A. No. Just that we were -- we had just finished eatin' and we were doing dishes and --

The Court: You will have to speak louder, I can't hear you hardly. Speak up a little bit.

The Witness: We had just finished eatin' and we started washing dishes and me and this other friend of mine and I was puttin' the dishes on the table; when I turned around the Detectives were there and they had two guns and they pointed at us and they said for us to get into the other room.

Q. Did they have your permission to come into the house?

A. No, they didn't.

Q. Did they produce a warrant? A. No.

88] Q. Did they produce a search warrant?

A. No.

Q. Did you ever see Agent Gress who previously testified

here before? A. Well, at the house; yes.
Q. Did you let him in? A. No.
Q. Did he have a warrant? A. No.
Q. Did he have a search warrant? A. No.

The Court: Well, that is all admitted and conceded a dozen times. What is the use of going over it again?

Q. (By Mr. Gerash) Did he look around the premises?
A. Yes, he just -- I mean --
Q. How did he look around the premises, will you please tell the Court? A. I know he just looked around the room and then he went into the kitchen and that was all. I mean, they didn't let us go in there.
Q. Did he hold and look at the marijuana?
A. Well, that man over there on the end, well, see, he had it and when Gress walked in --
Q. Are you referring to Captain Nelson?
A. Yes.
89] Q. Go on. A. Well, the marijuana was on the bed and when Gress walked in, he went over there and he opened it and looked into it. I don't remember what he said.
Q. But he handled it; did he handle it?
A. No, he didn't handle it. I mean, he opened it and looked in.
Q. I see. Did you see him take any samples?
A. No.
Q. Did he look anywhere else other than there? Did he look into the trap door for example?
A. Oh, yeah; yeah he did. He looked in there and he looked in the closet.
Q. Did he open the closet to look in?
A. Uh huh.
Q. Did the closet have a door on it?
A. Yes.
Q. Did he identify himself to you as a Federal Agent?
A. No.
Q. To the best of your knowledge, what property was missing on the premises after you were able to get back to your house? A. Well, there was waste paper basket; also camera that was given to me and some letters and they didn't take them right away. After they took us to jail, well I think it was Nelson that went up there and he said that he wanted the keys and at the time my mother was going over there, because

she was going to get some of my stuff to move over to her house and my mother told me that Nelson went over there and started searching all over again.

Q. Well, I don't -- Don't make any reference to what your mother told you that somebody else did.

A. Well, that is when they got the camera.

Q. Was Agent Gress in the car with you right after the search? A. You mean when they took us to jail, yes.

Q. Now, when you came back to your house after this unpleasant episode, was there the marijuana there that was found in your apartment or in that trap door, was it in that apartment? A. Do you mean after we --

Q. Yes. Did you find any marijuana there when you got back to your apartment? A. No.

The Court: What does that have to do with this case?

Mr. Gerash: I wanted to establish the fact that the marijuana was taken.

91] The Court: Well, is there any dispute about that? Let's face it. You mean this that they have testified about? The Officer testified he took it down and put it in his desk and kept it there all night and gave it to Mr. Marsh the next day.

Mr. Gerash: Then I won't go into that,your Honor.

That is all.

Cross Examination By Mr. Pfeiffer:

Q. Is this sack of marijuana, is it yours?

A. No.

Q. Do you know Joe Emmett? A. No, I didn't know him.

Q. You don't know Joe Emmett? A. I know him now, but I didn't know him at the time; no.

Q. Has he ever lived in your apartment?

A. No.

Q. Do you know Aniseto Silva? A. Well, I have seen him and that is all.

Q. That is all? A. Uh huh.

92] Q. Has he ever lived in your apartment?

A. No.

Q. This little trap door that is back there, is that part of your apartment? A. Well, it is just that they have -- It is for these light --

Q. The meterman goes in there? A. Yes.

Q. Is it the meter for your apartment?

A. No, I don't think so. I think it is for the whole apartment upstairs.

Q. Are you folks caretakers of the building?

A. At the time we were managing the place; yes.

Q. You were managing the place? A. Yes.

Q. So if something happened to a pipe under there, or something, why your husband, Joe, would certainly be able to go under there, wouldn't he? A. No, he wouldn't fix anything.

Mr. Gerash: I will have to object to this line of questioning.

The Court: I will sustain the objection; that is hypothetical. I will sustain the objection to that question.

Mr. Pfeiffer: I have no further questions.

93] Redirect Examination By Mr. Gerash:

Q. You stated that you were -- on cross examination, that you were more or less the manager or caretaker of the place. A. Uh huh.

Q. Do you always keep your door locked?

A. Yes. We had keys for all the tenants, front door and their own door.

Mr. Gerash: I see. that is all.

(Witness excused.)

Mr. Gerash: Petitioners rest, your Honor.

The Court: Do you have any evidence, Mr. Lawther, additional on behalf of this Emmett motion?

Mr. Lawther: No, I have no additional evidence.

The Court: All right, well, I'd like to hear from you gentlemen, I mean before we take any more evidence, as to

what your theory is as to whether there is any basis whatsoever for sustaining the motion.

Mr. Lawther: I believe that the evidence shows that the Gaitans were in possession of the property, constructive possession of the property in the fact that they were caretakers of the entire property and also that the evidence of Gaitans indicates that Mr. Gress entered the premises and actually did take constructive possession in the sense that he held the bag and also he did search the property.

94] The Court: I haven't heard anything that would even indicate that. What testimony is there that he took possession constructive or otherwise? Most of the witnesses testified that he didn't do anything to the bag. I think that Mrs. Gaitan testified that he opened up the bag. I think the other defendant was uncertain about that. So let's stay with the facts.

Now go ahead.

Mr. Lawther: The facts, I believe, indicate that Mr. Gress did enter the premises and he did look around the premises and being an Agent of the Federal Government, he in a sense actually did come into the premises and he took constructive possession; he had a constructive search of the premises. He isn't all together just an outsider.

The Court: You say took constructive possession of what?

Mr. Lawther: He took -- in reality he was in there on the premises and he did look around on the premises, and he did look at the bag of marijuana and I don't think that he is -- you can say that he had nothing absolutely to do with the situation there that evening.

The Court: Well, that is the way it sounded to me, that is what I wanted to hear you on. Sounded to me like the Federal Agents had nothing whatsoever about -- nothing to do whatsoever about the search and seizure what you
95] are complaining about. If they didn't, there is no basis for your motion, is there?

Mr. Lawther: What I was trying to say is I don't think

you can go that far in the event it does show that he did come into the premises and he did look around.

The Court: None of the items here that is involved in this search and seizure under all the evidence, there is no even suggestion that he searched and seized anything and the evidence on your own presentation comes to positively if there was a search it was made by the State Officers.

Mr. Lawther: Yes, but what I was trying to point out is the fact that you cannot say that the Federal Government had nothing absolutely to do with the affair that particular evening.

The Court: Then point me out some evidence to show that the Federal Government did have anything to do with the search and seizure.

Mr. Lawther: Well, by virtue of the fact that he was called in, by virtue of the fact that he did.

The Court: What you mean by that -- Talk in some language that I understand.

96] Mr. Lawther: They called him up on the phone and asked him to come down. He did come down. He did look --

The Court: That was after it was all over with, wasn't it?

Mr. Lawther: That was after the State Authorities --

The Court: The procedure you are complaining about had been completed. There is no evidence to the contrary. This evidence was introduced on your behalf and where is there any evidence of anything else but that?

Mr. Lawther: There isn't any other evidence other than the fact of what they have produced here.

The Court: Well, go ahead.

Mr. Lawther: That is my only contention is the fact that I personally didn't feel that the Federal Government is in such a position that they could say that they had nothing to do with it at that particular time, and that the facts showed some indication that they did have something to do with the search and seizure.

The Court: Do you have any cases in which the Federal Officers didn't appear on the scene until after the search and everything had been completed until after the defendant had been apprehended and they knew nothing of it previously or had no part in the transaction before that time in which it has been held that the Federal Officer participated?

97] Mr. Lawther: No, sir.

Mr. Gerash: I have some cases on that, your Honor.

The Court: I mean, do you have a case that holds the way that I am talking? I know there is a thousand cases -- not that many -- on the subject and I think I know what they hold but do you have any case that holds that there was Federal participation where the facts were that the Federal Officers never appeared or had any part of the thing until after the search had been completed and after the seizure had been made and where there was no evidence whatsoever of any former knowledge on the part of the Federal Officers or any former participation with the State Officers. Do you have any case that holds that?

Mr. Gerash: I think I do have a case that almost fits these facts to a "T" your Honor.

The Court: I'd like to see the case right quick. Mr. Lawther can complete, if you have anything further.

Mr. Lawther: I have nothing further to say.

The Court: Do you have anything to say on behalf of your own client or the other, even on any theory; even assume Federal participation, the evidence on behalf of Silva and Emmett would certainly show that there is no basis for sustaining the suppression as to them.

98] Mr. Lawther: That is right, there is no indication saying that the Emmett had possession.

The Court: Let me hear this case that Mr. Gerash has.

Mr. Gerash: The case is Lustig versus The United States of America.

The Court: Do you have the case? I can pick it up faster than you can tell me, if you can show me the case. If you don't somebody will go get it.

Mr. Gerash: Yes, I do. I believe our facts are more extreme, your Honor, because in that case the Police Authorities did have a warrant.

The Court: I mean, I just read the headnote here which does not seem to me to make it very applicable here. You may proceed.

Mr. Gerash: Your Honor, that case, although it did not hold forth, it didn't comment on the -- whether the Fourth Amendment was involved but it took upon the Federal Court, took it upon itself to state that at any time, whether a Federal Officer in any way participate in any action of such kind, it is incumbent upon the Court to please itself of any illegal search of the premises or to have the Officers explain why the Federal Officers are there without a warrant, without a warrant of arrest or a search warrant, and similarly so
99] in the Wray (?) Case which was a New Mexico case recently cited, the facts of the Wray Case are different than they are here but in that case, motion to suppress in the case was granted and thereafter the State attempted to --

The Court: I am familiar with that case.

Mr. Gerash: I just wanted to point out, your Honor, that there is a tendency now for the Federal Judges to, so to say, police themselves and make the Federal Officers responsible to constitutional guarantees since the Federal Agents are Authorities of the Court and the United States.

The Court: I don't think this case here supports your

position at all because there the Federal Agent involved, just from a very casual reading of it, was the one that suggested that the State Police, they go to this place and suggest for the arrangement. The Court says that to differentiate between participation from the beginning and a joining it before it had run its course, he got there and made a selection of the evidence and everything else before the search was completed.

In this case, the whole transaction was completed long before there was any Federal Agent ever told about the matter at all. And there was no selection of evidence or no going over the evidence except that Mr. Gress did look at the marijuana, just visually inspected it according to all the testimony and then the next day or some day following, was when it was turned over by another officer, by Captain Nelson, to the Narcotics Bureau.

100] In this case, Gress, the Federal Agent, was the one that gave the Police the suggestion to go to there, at this point, and --

Mr. Gerash: Well, the Police called up the Federal Authorities just like they did in this case, your Honor.

The Court: Well, I don't think the facts are at all analogous. That isn't the way the Supreme Court says it was. He called the Federal Officers. He indicated to the local Police that there was something wrong.

Mr. Gerash: In that case, your Honor, it said that it is immaterial whether a Federal Agent originated the idea or joined in it while the search was in progress.

The Court: But where is your evidence here? The search was over, I will agree with you, I just pointed that out. If, for instance, Mr. Gress had gone down there -- suppose just hypothetical in this case that after they got down there they decided to call the Narcotic Bureau and he had gone down there and while the search was in progress and then after the thing had been done, even though he manually didn't make the search but if he was there when it was done, why you would have something to come within the framework of this case but there is not a bit of evidence to support that theory here.

101] Do you have anything to add here?

Mr. Pfeiffer: Yes, sir. I have a case from the Ninth Circuit, Symons versus The United States, 178 Federal Second, 615. I think the facts of that case are pretty identical to this case.

Briefly, I think that the facts are that a woman in a motel caused the local Police -- they go out to this motel and they search around in the motel room and find that there are fragments of marijuana or heroin, whatever the narcotic drug was, and found out that the former occupant of the motel had an automobile. Got the driver's license and finally scouted around and found that that car was parked in front of a certain place. They then kicked down the door, went in and arrested the people, seized a number of tins and then at that point, about two o'clock in the morning, they then called the Narcotic Agents, a Narcotic Agent by the name of Craig.

Craig then came immediately over to the place or in an hour or so, I believe, according to the facts there, and he then "took charge"; he re-arrested the defendants there and they were taken under Federal control.

102] The Court, in the Ninth Circuit, says -- quoting from the Lustig Case, that you just read here, that when the evidence is turned over from the State to the Federal Government on a silver platter, a person cannot object to an unlawful search and seizure. We feel in this case that the facts go further in that the Federal Agents, two of them, I believe, were present during this evening, but they did not participate in the search. There was no agreement really until the next day or subsequently, that the matter would be handled in the Federal Court.

We feel that that case is right on point. We do further assert here as to Emmett and Silva, that they have not laid sufficient foundation to object to it; for the further reason as to Gaitan, he says that this marijuana wasn't even on his premises, but we feel that all the circumstances that that Symons Case is controlling in this matter.

I might also state that the evidence so far is that they were placed under arrest and a search was pursuant to that.

The Court: Don't know that that makes much difference. Do you have anything further?

Mr. Gerash: Yes. Our position is similar with that of the late Justice Murphy, dissenting very vigorously, in the Rabenowitz (?) Case. Justice Murphy stated that in essence his position was that although the evidence is in on a silver platter, the material on the platter has been poisoned by the State illegal search and seizure and as for him,
103] his position is that the historic roll -- historic protection of the Fourth Amendment is good enough as against the Federal Officers, even though the State Officers illegally seized the evidence.

Now that may not be the law now, your Honor, but we feel also in the Amoia Case, U. S. versus Amoia, where the City Police entered the premises and opened -- found a still in the basement and he stood guard on it in that basement until relieved by other officers. Then the Police Department informed the Federal Officers who came over to the still and inspected the still and at no time was a search warrant produced by anyone in that case. They held that --

The Court: Well that, I don't see, is involved in this case. The question here is whether the -- I mean, the basic question is whether there was sufficient Federal participation to bring the rule within the Federal Rule or whether the search by the State Officers is subject to examination on that basis.

Mr. Gerash: We feel our basic position is that there was collusion, that there was cooperation.

The Court: I asked Mr. Lawther, where is there any evidence of collusion, prearrangement, or anything else?

104] Mr. Gerash: We feel a telephone call is a communication.

The Court: Well, that was after the whole thing was completed.

Mr. Gerash: Well, we feel that -- we feel that the fact that the Federal Officer looked around and inspect the evidence, that the facts brought out on examination, showed that there was still something to be done. And still something --

The Court: What was it, I might ask you?

Mr. Gerash: Perhaps a discovery of other evidence.

The Court: We are not involved in that, you are asking specifically for the suppression of the evidence that was taken at that time by the City Police. That is all that is involved here.

Mr. Gerash: However, it was taken by the City Police, and that same evidence was given to the Federal Authorities.

The Court: Well, that was according to the evidence, the marijuana.

Mr. Gerash: A day after, your Honor.

The Court: Yes.

Mr. Gerash: And we feel that this could not arise from the air itself. That it specifically arose from the conversations or -- and telephone calls and inspection and communication that took place on the premises. We feel that these things could not have happened in the air, your Honor,
105] and there is obviously collusion implied when the Federal Agents were there on the premises. And, they inspected the premises. We feel that also in the U.S. versus Janitz case, 1946 case, 161 Federal Second, 19, that the court held that the old proprietary interest rule has no application and that, therefore, we feel that even though the contraband was not specifically claimed ownership to, it is not necessary; merely because the articles were on the premises and the very fact that the articles there were locus in quo, that therefore they were in possession of the individuals, the defendants concerned, and no proprietary interest need be shown in a motion to suppress if it is the defendant's own premises. That is fairly clear law on that, your Honor.

The Court: Well, I don't think you have even brought the case near the rule that would be necessarily invoked to suppress this evidence; this case that the Government -- Symons against the United States, a Ninth Circuit Case, the facts are very similar to the facts in this case. They cite the Lustig case that you relied upon and point up the very difference that I just

pointed out to you. The Court of Appeals said the undisputed evidence fully sustained the findings, that was the findings of the trial court, along the line I just indicated. We think
106] the facts of this case squarely meet the test recently announced in the Supreme Court in Lustig versus United States. It is not a search by a Federal Officer, if evidence secured by State Authorities is turned over to the Federal Authorities on a silver platter.

Here, and I call your attention to this as being analogous to the case at bar, here -- that is the case I am reading from -- the Federal Officer did not instigate the search. There is absolutely no evidence here that they instigated the search under consideration.

Secondly, they did not join it while it was in progress. That was the words of the Court of Appeals and certainly, there is not a word of evidence or even a suggestion from the evidence in this case that the search was joined by the Federal Officers while it was in progress, and

Thirdly, they did not participate in the search. That again is what the facts are in this case, undisputed by your own testimony. There is not a single witness that testified that they participated in the search or any Federal Officer that brought about the discovery and seizure of this marijuana, so the motion to suppress will be denied as to all defendants.

Now, that will leave open the matter of this joinder.

Mr. Gerash: Therefore, I am foreclosed from citing
107] more authority on that matter.

The Court: Well, it is so obvious. I have given you all the chance that I think you need. If you have any more authorities, tell me quickly what they are. I asked you for a case and you gave me this Lustig case.

Mr. Gerash: I attempt to bring out some more authorities on this, your Honor.

The Court: I mean, this Ninth Circuit Case seems to be squarely on the nose and if you have anything that you think is pertinent, tell me what it is.

Mr. Gerash: I think that the U.S. versus Minor case, 117 Federal Supplement, 697, wherein they stated that regardless, even though the material was not seized, a search was illegal.

The Court: Where is there any evidence of a search? I don't like to argue with you all the time. Let's start over again. Where is there any evidence in this case that the Federal Authorities instigated the search? That is one of the elements in the Lustig case. Where is there any evidence that they joined in the search while it was in progress and where is there any evidence that they participated in the search?

Mr. Gerash: Well, they entered the premises without the permission of --

108] The Court: That makes no difference.

Mr. Gerash: All right. They went down into the basement apartment after walking down the stairs and they looked around. Now, looking around possibly cannot be termed a search but they --

The Court: What is it you are complaining of here? I cannot follow your reasoning entirely. Looking around this room surely never constituted a search and seizure under any theory.

Mr. Gerash: Mrs. Gaitan testified to the fact that the Officer went in, that Agent Gress looked into the trap door.

The Court: Does that constitute a seizure of anything?

Mr. Gerash: Illegal search, your Honor.

The Court: Well,what you are complaining of is suppressing of evidence that was seized illegally, you say. Now, the thing that was seized is this marijuana that you have indicated here undoubtedly under your own evidence was taken by Captain Nelson without the participation or involvement of any Federal Officer. Now, Mr. Gress went down and looked around, opened the door even after the thing was all over with.

Certainly there wasn't any participation, if your theory is along the line you are talking. I don't know if there is any purpose of further argument. If you have any other
109] matter, tell me briefly what it is, because I cannot see -- You are assuming a certain statement of facts that the Court has found does not exist here.

Mr. Gerash: The very fact that the Police went back within five days.

The Court: That hasn't anything to do with this case, because your motion isn't even directed to that and the thing you are seeking to suppress here was this marijuana that was taken on this occasion.

This camera and this other stuff that you mentioned under your own evidence is not even in Federal possession, it won't be offered in evidence here, and that is over in the State possession. So all that is involved is whether or not this marijuana was taken, found by Captain Nelson, should be suppressed in the evidence in this trial.

Mr. Gerash: Your Honor, do you feel that from the evidence that Agent Grees was further looking for other evidence of marijuana?

The Court: I don't care whether he was or not. I say there is nothing that is a sure thing from the evidence that he made no further seizure and made no further search. If looking around a room is a search, that is something new to me, or opening a door and looking in a room, unless there is a seizure with it. Your own motion contemplates an unlawful search and seizure and you are complaining about the admissibility of this marijuana. Nothing he did or found is going to be evidence in the case.

110] Mr. Gerash: There are cases that have stricken mere legal searches and have withheld --

The Court: It has to be some tangible evidence. They suppress evidence, not an item, some matter. You can't suppress a look around in a room very well as evidence. I don't think, I don't believe there is any purpose to prolonging the discussion because you apparently don't agree on what the facts show. I

don't think there is even a debatable inference in the facts. And so, the motion will be denied and you may proceed with your other motion. The motion as to all defendants is denied because obviously -- on these other two there is no basis at all to proceed.

Mr. Lawther: I will proceed with my motion for severance and separate trials by defendant Joe Emmett.

In the indictment, on Count Four and Count Five, does not pertain to the defendant, Joe Anthony Emmett; Count Four charges Joseph Anthony Gaitan and Dolores Mary Gaitan with acquiring and having transferred to them and receiving five pounds, 14 ounces of bulk marijuana. Count Five, that Joseph Gaitan and Dolores Mary Gaiten being persons who were transferees, required to pay the transfer tax imposed by Section 4741, did conceal and facilitate the concealment of approximately five pounds and 14 ounces of bulk marijuana.

111] The defendant, Joe Anthony Gaitain is not mentioned in those two particular counts and has nothing to do with the defendant. We feel that the evidence which would be submitted by the Government in regard to those two counts would be prejudicial against the defendant, Joe Anthony -- Joe Anthony Emmett.

The Court: Well, it would all be admissible, the same evidence would be admissible under the conspiracy count, wouldn't it?

Mr. Lawther: Yes.

The Court: Well then, what?

Mr. Lawther: The fact of possession would not necessarily be admissible under conspiracy because the defendant could not conspire with them to possess it. They could conspire with them to obtain it or to transfer it. Under Rule 14, it provides relief from prejudicial joinder if it appears that a defendant or the Government is prejudiced by joinder of offenses or if, or of defendants in any indictment or information or by such joinder for trial together.

The court may order an election or separate trials of

counts, grant severance or provide whatever other relief justice requires.

112] In the case of Stokes versus The United States in 93 Federal Second, 744, it states that it is not good practice to charge separate defendants with separate offenses in the same indictment and a defendant so charged may by timely motion compel an election, secure a severance or obtain some other relief appropriate to a separate trial.

It is my contention that it will under this evidence, which will not necessarily prove the conspiracy, but will prove other counts which are against Joseph Gaitan and Dolores Gaitan which have no bearing whatsoever upon Joe Anthony Emmett. And, therefore, a severance should be granted.

The Court: I think you may proceed with your motion, then I will hear from the Government on both of them.

Mr. Gerash: Your Honor, if you could reflect on the confusion, perhaps the numerous instructions that the Court would have to make concerning the various counts, there are five, I believe, counts in the indictment, and there are two counts that do not concern the defendants -- the defendant Silva at all; namely, the count involving 26 U.S.C., 744, in Count Four in the indictment. Also, in Count Two of the indictment the defendant is not named -- rather, Silva is not named a defendant at all. Evidence entertained as to Count Four and Count Two in the indictment has no bearing or any relation to the defendant Silva and hence, we feel that the other charges against Silva would be unduly prejudiced by the telling of a story and the attempt to prove other charges that do not
113] involve the defendant at all. And, therefore, the Court would have to instruct thoroughly the jury and hence would perhaps mislead and confuse the jury because of these other indictments that have nothing to do with the defendant Silva.

I similarly cite the Stokes case, that was cited by Mr. Lawther that it is not good practice to charge separate defendants with separate offenses in the same indictment and the defendant so charged may by timely motion compel an election, secure severance or obtain some other relief appropriate to the end desired; and so forth.

* * * * *

Gaitan et al. vs. United States of America

140] Transcript of Trial Proceedings.

Proceedings had before Honorable William Lee Knous, Chief Judge, United States District Court, District of Colorado, and a Jury, in Denver, Colorado, at the Post Office Building, in Courtroom A, on April 11, 1957, at 9:30 o'clock, a.m.

Appearances: Honorable Donald E. Kelley, United States Attorney, District of Colorado, and Honorable John S. Pfeiffer, Assistant United States Attorney, District of Colorado, appearing for the Government. Walter L. Gerash, Esq., and Francis P. O'Neill, Esq., Attorneys at Law, 830 Majestic Building, Denver, Colorado, appearing for the Defendants Joseph Aguilar Gaitan, Dolores Mary Gaitan, and Aniseto Silva. Blair J. Lawther, Esq., Attorney at Law, 3035 East Colfax Avenue, Denver,Colorado, appearing for the Defendant Joe Anthony Emmett.

* * * * *

186] ARTHUR G. DILL, a witness called on behalf of the Government, being duly sworn, testified as follows:

Direct Examination By Mr. Pfeiffer:

187] Q. Would you please state your name? A. Arthur G. Dill.

Q. Where do you live, Mr. Dill? A. 120 East Eighth Avenue, Denver, Colorado.

Q. Are you married? A. I am.

Q. Do you have a family? A. I do.

Q. By whom are you presently employed? A. By the Police Department, City and County of Denver, Colorado.

Q. For how long have you been with the Police Department?

A. Seven years.

Q. What unit are you attached to at the present time?

A. The Intelligence Unit, Denver Police Department.

Q. For how long have you been with the Intelligence Unit? A. Since its inception four years ago.

Q. What is the Intelligence Unit?

A. It was mainly set up from the standpoint of keeping a surveillance on organized crime within the City and County of Denver.

Q. Directing your attention to the 5th day of February, 1957, were you on duty? A. I was.

Q. And in the afternoon of the 5th day of February where
188] were you, well, in the latter part of the afternoon?

A. I was directed by Captain Nelson to place under surveillance the establishment at 1831 Williams Street.

Q. Where did you go? A. I went to a doctor's office at 1834 Gilpin.

Q. Here in Denver, is that right? A. Yes, sir.

Q. At what time was this? A. Approximately 4:00 p.m.

Q. Now, what did you have with you if anything at that time?

A. Well, upon going into the doctor's office I had with me a pair of 7-50, 7 by 50 power binoculars Army type and a walkie-talkie for communication between myself and the cars that would be in the area.

Q. Handing you what has been marked Government's Exhibit 8 can you state what that picture portrays?

A. Well, this picture would show the exact spot from which I was at vantage point to watch the home at 1831 Williams. Across the alley this building here is the doctor's office. The doorway and the windows on the righthand side were all in one room where I was located.

Q. Handing you what has been marked as Government's
189] Exhibit 9 I will ask you to state if you can recognize that photograph. A. Yes, sir, this is the approximate view that I would have from the doctor's office. I would be looking directly at the back door with the north side of the house and the lateral south side of the house at 1831 Williams Street.

Mr. Pfeiffer: We will offer Government's Exhibits 8 and 9.

Mr. O'Neill: We have no objection to the Exhibits 8 and 9.

The Court: They may be received in evidence.

(Government's Exhibits 8 and 9 for identification received in evidence.)

Q. Now, Mr. Dill, handing you what has been marked Government's Exhibit 9 would you state what you observed, what you first observed when you stationed yourself there on surveillance I believe you said? A. At approximately 4:15 p.m.

I was in the rear room there, which is the chart room in this doctor's office. At that time parked on the same side of the alley that I was on was a 1956 Ford, red and white in color. At that time there were two parties standing or starting to walk from directly behind that car approximately five to six feet behind that car. They walked across and into the side door pictured here. At that time that this car was parked here there was also a 1951 Pontiac, green, bearing Colorado license number A over 10, and I believe the numbers were 9565.

190] Q. Now, those two individuals that were standing behind this car did you or would you recognize them if you saw them again? A. I would.

Q. Who were they? A. They are two of the defendants here in Court, Mr. Silva and Mr. Emmett.

Q. Where are they seated? A. The party on this side and the party at the end of the table.

Q. By this side which end of the table?

A. At the far end of the table next to Mrs. Gaitan.

Q. Just go right on and state what you saw.

A. Those two cars were there plus this car that is in the picture here.

Q. I wonder if you could turn around so you could show it to the jury when you talk. A. This car was also there at that time.

Q. The car exhibited in the photograph? A. Yes.

Q. That was -- A. That was approximately 4:15 p.m.

191] Q. Proceed. A. At approximately a little after 5:00 two parties came out and got into the 1951 Pontiac, green color.

Q. Where did they emerge from? A. They emerged from the side door of the residence at 1831 Williams.

Q. Do you know those individuals? A. I do.

Q. Who were they? A. Jack VonPickerell and Ronald Joseph.

Q. What happened after that? A. They came out, got into this car, backed out from alongside the garage at the rear of 1831 Williams and drove off outwards towards 18th Avenue.

Q. Now then, what did you next observe?

A. Right after that Mr. Gaitan and Mr. Emmett came out, walked across from the side, they came out the side door, walked across the alleyway into the parking lot behind the doctor's office, got into this 1956 Ford, red and white color, backed out and drove off down south in the alley towards 18th Avenue. That was at approximately 5:30 p.m.

Q. By Mr. Gaitan do you see him in the courtroom?
192] A. Yes.
Q. Where is he? A. He is the party seated on the left-hand side of the table closest to me.
Q. Now then, what did you next observe?
A. The next was a 1946 maroon Ford bearing Colorado license 104562. There were four Spanish American youths, they came up, drove in, and parked behind the doctor's office. Two of the occupants emerged from the car at that time, one of them went over to the basement window and either scratched or knocked on that window. Then he walked behind the house, and the two of them went to the side door, stood there for a minute and then went in.
Q. Did you know those individuals? A. I did.
Q. Who were they? A. One of the individuals was Thomas Crews, the other one was Salvadore Gonzales.
Q. Which one walked over to the window?
A. Thomas Crews.
Q. By the window, is that portrayed in this picture?
A. Yes, sir, it is. It is this window that you can see here between the small and the large tree.
Q. Now, what did you next see? A. They came out and left
193] in this Mercury driving off toward 18th.
Q. By they whom do you mean? A. Well, Thomas Crews, Salvadore Gonzales, and the other two occupants of the car. They had stayed in the car, and they came out, and they left. Approximately a minute after or two after they had left Mr. Gaitan and Mr. Emmett returned. They returned approximately 5:40 or 5:45.
Q. How did they return? A. In the 1956 Ford, red and white color.
Q. Now then, what did you next observe? I might, first of all, what were you using to observe?

The Court: He has already said. He said he had these binoculars.

Q. Were you using binoculars? A. Yes, I was. To explain further, I was unable to tell what type of license plate was on this 1956 at that time, as the rear plate was completely covered with mud, and I could not ascertain the license number on the car. I did ascertain it later when it was being followed by other officers in the car to whom I was realying the messages.

Q. Did you subsequently see that car, that license plate yourself? A. I did.

194] Q. What was the license number? A. I believe it was F over U, 1956 plates.

Q. What did you observe after you saw Mr. Gaitan and them return? A. They returned, and at approximately 6:00 o'clock p.m. the maroon car with the four occupants, Thomas Crews, Salvadore Gonzales, and two other unknowns returned and parked once again behind the doctor's office. The same routine was followed, Mr. Crews went to the window, then the two of them walked around, and they were -- after standing there a brief moment they went in. They were standing alongside the side of the -- the side door. Then they went in. Approximately 10 minutes later they came out. They walked across, back across the alley, got into the car, the car backed out, and once again it went southward out the alley onto 18th Avenue.

Q. What did you next observe? A. At approximately 6:15 p.m. Mr. Gaitan, Mr. Emmett, and Mr. Silva came out of the side door of 1831 Williams, walked across the alley. Mr. Gaitan got into the passenger side of the car, Mr. Silva got into the back seat, and Mr. Emmett drove the car.

Q. And where did they drive to? What did you observe them doing? A. They backed out, drove down the alley towards 18th.

195] Q. Then what did you next observe?

A. They returned approximately 20 minutes later at approximately 6:35 p.m. At that time Mr. Gaitan, Mr. Silva, and Mr. Emmett got out of the car. Mr. Gaitan was carrying a box, a cardboard box that I could see had some canned goods and some groceries. Mr. Silva got out of the back seat and was carrying a large shopping sack.

Q. Have you ever worked for a grocery store?

A. I have.

Q. What size sack would you say that would be?

A. That would be comparable to the 25, what they call a No. 25 sack.

Q. Now then, just go right on and state what they did.

A. They went into the house by the side door. Approximately 10 minutes later Mr. Gaitan came out carrying four cardboard cartons and one sack. He stopped on this side of the ash pit, walked over to this side taking out some cans and bottles, putting them in there. Then he went back around to the garage side of the incinerator part here and put the sack in and started a fire in there. He then tore up the four cardboard

cartons and stayed with it until the flames had somewhat died down.

196] Q. How did he tear up the cardboard?

A. Well, he tore them up in strips. Instead of pushing them in as whole he tore the cardboard boxes up putting them into the ash pit to burn.

Q. What happened after that? A. Then he returned back into the house by the side door.

Q. What next did you observe? A. The next observance was at approximately 7:00 o'clock p.m. being from the vantage point I was at I could see through onto Williams Street, approximately a 1952 to '53 Oldsmobile black, license number unknown, drove up to the front. The party appeared to go to the front door and then came back to that car about five minutes later and departed.

Q. Now, did you see which door he came out of if he did?

A. No, I did not.

Q. He just went back to the car? A. That's right.

Q. What happened after that? A. At approximately 7:25 p.m. approximately a 1951 or '52 Mercury maroon color, four-door sedan, drove up on the opposite side of the street on Williams. A party emerged from the front of that car and one from the back seat of that car and went to what appeared to be the front of the residence at 1831 Williams Street. There were still two occupants in the car. These parties went in at approximately 7:25 p.m., and at approximately 7:40 p.m. these two parties that had went to what appeared to be the front door came out the side door. One of them known to me was carrying a small approximately a number six sack, carried it back, got into the car, and the car drove off heading northward to Williams Street.

197] Q. This person, you said he was known to you. What was his name? A. Donald Buano.

Q. What next happened? A. After this party had left in the meantime Captain Nelson had been informed of the activity, and by communication with him through the walkie-talkie there was a meeting out in front on Gilpin Street of the officers who were being informed by me of the occurrences going on. At that time I was informed that three of them --

Mr. O'Neill: Just a minute, your Honor.

Q. Don't go into the conversation. A. I was at the conversation myself.

Q. None of the defendants were present.

A. Three of the officers were directed to the rear of the establishment at 1831 Williams Street.

Q. Did you see them go there? A. I did.

198] Q. Who were they? A. The officers were Winfred Russell, Detective Wilbur Norden, and Sergeant Duane Borden.

Q. Where were you? Did you observe them go back there?

A. I did. I was still in the office in the rear of the doctor's office watching the back end and also the front part of the residence at 1831 Williams.

Q. Then what happened? A. At approximately 9:00 p.m.--

Q. First of all, how was this place, was it lighted or would you state the lighting? A. There are three outside lights, more or less floodlight type. This house here right next to it is a doctor's office or medical building, and it had an outside light. Across the alley directly in back of it, in the first place, northward of the building that I was in also had a night light, a small flood lamp. There is another building to the south of the building that I was in, and it had a spot light. So, this side of the building was very well illuminated.

Q. Did anything happen to that after the officers went out there? A. Yes, sir. When the officers proceeded to the back of the house they were there approximately a little over

199] three-fourths of an hour when they decided, and I watched Detective Norden go over and turn out the light by unscrewing the bulb on the building across the alley and the building on the same side of the alley that I was on which darkened the side of the house.

Q. What happened after that? A. That was approximately 8:30 to a quarter of 9:00. At approximately 9:00 o'clock the officers, they were standing in this recessway, and I had lost sight of them for a moment, the next thing that occurred was approximately a '54 Buick drove up, the party got out, he went to the basement window and either knocked or made some motion toward the window, and then he walked around and to the door at the side of the building. At that time I observed Detective Russell talking to him, and I came out and took a lady that was in the car out of the car and told her to come with me.

* * * * *

213] DUANE L. BORDEN, a witness called on behalf of the Government, being duly sworn, testified as follows:

Direct Examination By Mr. Pfeiffer:

Q. Would you please state your name?
A. Duane L. Broden.
Q. Where do you live, Mr. Borden? A. 1650 South Vallejo.
Q. Are you married? A. Yes, sir.
Q. Do you have a family? A. Yes, sir.
Q. By whom are you employed? A. Police Department, City and County of Denver.
Q. In what capacity? A. Police Sergeant.
Q. How long have you been with the Police Department?
A. 11 years.
Q. Are you assigned to any special unit?
A. The Intelligence Division.
214] Q. How long have you been with Intelligence?
A. A little over a year.
Q. Now, were you on duty the evening of February 5, 1957?
A. I was.
Q. Where were you? Did you go to the vicinity of 1831 Williams Street? A. Yes, sir.
Q. Who was with you at that time?
A. Detective Russell, Detective Norden.
Q. What did you do? A. We had this residence under observation up there.
Q. Handing you Government's Exhibit 9 I will ask if you were anywhere in that vicinity.
A. Yes, I was.
Q. Where were you? Will you show it to the Jury and point out where you were? A. Standing right at the back side, that white step next to the wall.
Q. About what time did you station yourself there?
A. Roughly 8:00 o'clock.
Q. What happened then? Will you state what you did or what you observed or what happened?
A. I stood there about an hour, and I was with Detectives Norden and Russell, until two parties emerged from the side door there.
Q. Did you know those two parties? A. It was the defendant
215] Emmett on this side of the table and Silva on the end of the table.
Q. Now, Emmett is on what end of the table?

A. He is on this side.

Q. On the far end of the table? A. Far end, yes, sir.

Q. What happened at that time? A. They were just cracking the door to leave when I would say we pounded on them and got inside the door there.

Q. Now, by cracking the door, Government's Exhibit 11, is that the door you are referring to?

A. It is.

Q. Then, what did you do then? Will you state what you did? A. We placed these two parties immediately under arrest, searched their persons just inside the door there.

Q. Was it on the landing or, where did you search them?

A. It would be a landing, yes, sir.

Q. You searched them right there. What did your search reveal? A. We took a Prince Albert tin can of what appeared to be marijuana to me out of the inside right coat pocket of Emmett.

216] Mr. Pfeiffer: Let the record show I hold in my hand a manila envelope that has been marked Government's Exhibit 18 which is sealed, and at this time I open it. I remove therefrom a sack that I ask to be marked as Government's Exhibit 18-A for identification.

(Objects marked Government's Exhibits Nos. 18 and 18-A for identification.)

Q. I hand you what has been marked as Government's Exhibit 18 and ask you to examine the contents thereof and state whether or not you can identify it.

A. This outer envelope is in my handwriting. This item here is the Prince Albert tobacco can and with my initials on it, and the date is the 5th of February, 1957.

Q. Did that come into your custody? A. Yes, it did.

Q. Where did it come from? A. It came from the right inside coat pocket of the defendant Emmett.

Q. That was on this evening that you arrested him?

A. That's correct.

Q. I wish you would examine the contents thereof and state whether or not it is in substantially the same condition as when you found it. A. It appears to me to be the same.

217] Q. Now then, what did you do with Government's Exhibit, the contents of Government's Exhibit 18-A?

A. After initiallying it it was taken to police headquarters,

turned over to the Bureau or Captain Nelson.

Q. And it remained in your custody until you turned it over to Captain Nelson? A. That's correct.

Q. Now then, what happened after that, after the search?

A. After the initial arrest there?

Q. Yes. A. We took both of these two parties into the bathroom, lavatory just to the left of that side door, closed the door, waited there approximately five minutes until Mr. Gaitan came up the stairs, opened the door and admitted another party, this same outside door.

Q. Then what happened? A. After this party was admitted I closed the side door and started to descent into the basement apartment, and at that time we also placed them under arrest.

Q. Then what did you do? A. We took Mr. Gaitan and this other party, Wayne Brantley, down into Mr. Gaitan's apartment, also took the other two defendants here, Emmett and Mr. Silva, down into the apartment.

218] Q. What happened after that? A. After that I sent Detective Ruswell out to make contact with Captain Nelson and waited until he arrived.

Q. Did Captain Nelson arrive? A. Yes, he did.

Q. What happened after that? A. There was a search made of the premises.

Q. Did you help them search? A. I participated slightly, possibly or mostly in the kitchen area, bathroom area.

Q. And then what did you do after that? Was there a telephone in the room? A. Yes, there was.

Q. Did you do anything with that? A. I used the phone twice I believe.

Q. Whom did you call? A. I eventually got ahold of Federal Narcotics Agent Gress.

Q. Did you receive any other -- about when was this, do you know? A. I think around 9:15 or 9:20 in the evening, something like that.

Q. Did you receive any phone calls? A. Yes, I did.

Q. Whom did you receive it from? A. I received a call

219] from Mr. Gress.

Q. Then did you later have an occasion to take the defendants down to jail or anything? A. I didn't personally, no.

Q. You did not? A. That's correct.

Q. When you searched, you did state that you searched the defendants or Emmett and Silva upstairs. Did you find anything else in their pockets or any money or anything?

Mr. O'Neill: Just a minute. These questions are becoming leading and suggestive. I think he can properly phrase the questions.

The Court: I think the questions are leading. You can ask him what he found.

Mr. Pfeiffer: All right.

Q. What did you find when you searched them up there?
A. Mr. Emmett had a large roll of currency in his right-hand trouser pocket.
Q. Mr. Emmett? A. The top bill on the roll was a hundred dollar bill, as I recall, and as far as Silva, he appeared to have quite a sum of money also in a billfold.
220] Q. In his billfold, is that correct? A. Yes, sir.

* * * * *

227] JAMES SHUMATE, a witness called on behalf of the Government, being duly sworn, testified as follows:

Direct Examination By Mr. Pfeiffer:

* * * * *

228] Q. By whom are you employed? A. The Police Department, City and County of Denver.
Q. In what capacity? A. Lieutenant in charge of the Bureau of Identification.
Q. And do you have certain records that are held under your custody and control? A. Yes, sir.
Q. Have you produced certain of those records at my direction? A. Yes, I have.
Q. May I see them, please? A. Yes.

(Documents marked Government's Exhibits Nos. 19, 20, 21, and 22 for identification.)

* * * * *

Gaitan et al. vs. United States of America

In Chambers

Mr. O'Neill: If the Court please, at this time on behalf of the defendants Gaitans, both Gaitans and on behalf of the defendant Silva, and I am sure he would join in this motion on behalf of Mr. Emmett --

229] Mr. Lawther: Yes.

Mr. O'Neill: -- we move at this time that the Court grant a mistrial, and the ground and basis for that is that just prior to the recess, which we are now having, the United States Attorney had marked as Government's Exhibits 19, 20, 21, and 22 four sheaths of papers which purport to be the police records of certain individuals that are accompanied by arrest records, pictures, and this is a statement of some kind of certain offenses which have been committed by certain parties and also with a fingerprint sheet attached to that. The exhibits, your Honor, were marked in front of the Jury, they were marked there in such close proximity to the Jury by the reporter that it was almost, it is almost impossible to say that the Jury did not see these items and that we cannot presume on anything that somebody on that Jury does not know what these items are, that they are the police records and arrest records and fingerprints of the four defendants who are on trial here, and that the very fact that this is part of the Government's case, as yet not any of the defendants have taken the witness stand on their own behalf, that they have very seriously prejudiced the rights of the defendants by even marking these particular exhibits in evidence, and we believe that the Court should grant a mistrial.

230] The Court: What have you to say, Mr. Pfeiffer?

Mr. Pfeiffer: It is our contention that as far as having the exhibits marked, the appearance of the exhibits itself does not show as to what the contents are, and the distance between the Jury and the reporter they could not see these. No questions were asked as to what these exhibits were. We feel that pertinent portions of these records are admissible, and we feel that --

The Court: Might I inquire why you had the whole record marked in the presence of the Jury when I understand from what

you just say you knew that some of them would not be admissible in evidence? You had them marked as solid exhibits and they could not be separated or anything else. What was the purpose of that?

Mr. Pfeiffer: The purpose of this is to show the identify that these records belong to these individuals.

The Court: You mean that you could properly offer them in evidence showing a prior criminal record?

Mr. Pfeiffer: No, sir.

The Court: Do they show that?

Mr. Pfeiffer: Yes, one of the sheets does.

The Court: Under what theory could that be offered in evidence, and why should it be offered by the Government?

231] Mr. Pfeiffer: I am not offering it.

The Court: How could you, when you have marked it how could you offer it otherwise than the whole exhibit?

Mr. Pfeiffer: What we were going to do was have him identify the records and just say, "These are records kept under his supervision as to this person," have this exhibit marked and offer this alone, and that's all there was.

The Court: Well, what was the purpose of marking the others?

Mr. Pfeiffer: To show that this record here, sir, this record does not show--why, there might be 18 Aniseto Silva's down there at this time.

The Court: If this witness doesn't know, he isn't competent to testify as to Silva. If I understand you right now, he never saw this defendant, and, if you are attempting as you told the Court a moment ago, to establish how much money the defendant had when he was searched, or any of the defendants, this witness can only testify on the basis that someone else gave him the money and the amount of it. On that basis it would

be like having someone come in here and identify this can of marijuana by the fact it was in his custody and look at the record and offer the record to show the defendant had it. That doesn't make sense.

232] But on the motion for mistrial it will be denied on this basis: That counsel for the defendant very commendably at the moment he saw these and what they were called the matter to the Court's attention and before they were mentioned as being anything other than the records of the Police Department and before there was any identification beyond the point that the witness said he had produced certain records, there was nothing exhibited to the Jury, and my own notion is that the Jury never saw these or never were able to see them close enough to identify what they were, and that there has been no prejudice occur up to this point on the matter and they should not be produced in the courtroom again.

Now, Mr. Pfeiffer said here that he thinks that this top slip is admissible. The Court doesn't agree, and I have told him, if he has any authority that would support that view, I would listen to him. The motion for mistrial will be denied.

Mr. Pfeiffer: Now, the other --

The Court: Do you mean to tell me that this witness by record or anything else can testify that this money was taken from these individual defendants?

Mr. Pfeiffer: These records show, sir.

The Court: By that do you mean to say that as a matter of law a witness can come here on the basis of records and say this can of marijuana was taken out of what's his name's pocket?

233] Mr. Pfeiffer: No, sir.

The Court: What is it then?

Mr. Pfeiffer: This witness can come in and identify these records and testify to that fact.

The Court: That is the one I want to see, some law that

makes a record like that admissible.

Mr. Pfeiffer: This is taken in the ordinary course of business.

The Court: I don't care if it is. So are all the rest of them. If you want to call the individual that searched him, and he said, "I took some bills off of him," just exactly the same process you use every day with marijuana. You have called a witness who took it off, and on your analogy you could call whoever the custodian was of the Police Department to come here and produce a record to show secondhandedly on a hearsay basis that the marijuana was taken off of Silva. This witness on the stand doesn't know that these bills were taken from either of these defendants. Do you mean to say that on the basis of a record that the witness is competent to testify about the origin of the money? That just doesn't make sense.

You can tell the officers that searched him, and he can say, "I turned the money over to the custodian," and whoever counted it can testify as to how much it was. All he can testify is that officer so and so turned this money over to him and he got it from Silva. It is hearsay in every sense of the word. Do you want to find some law?

234] Mr. Pfeiffer: No. I will recall the witness if I have to.

The Court: As I say, they are not to be in that form and showing up in the courtroom at all.

* * * * *

235] WALTER G. NELSON, a witness called on behalf of the Government, being duly sworn, testified as follows:

Direct Examination By Mr. Pfeiffer:

Q. Would you please state your name? A. Walter G. Nelson.

Q. Where do you live? A. No. 1 Yates Street, Denver, Colorado.

236] Q. Are you married? A. Yes, sir.
Q. Do you have a family? A. No, sir.
Q. Just you and your wife? A. Yes, sir.
Q. By whom are you employed? A. The Police Department of the City and County of Denver.
Q. How long have you been with the Police Department?
A. It will be 15 years come the first of December.
Q. You hold a title there? A. I am a captain of the police.
Q. And what unit are you assigned to?
A. I am in charge of the Intelligence Unit of the Denver Police Department.

* * * * *

237] Q. Were you on duty February 5, the evening of February 5, 1957? A. I was.
Q. Where were you at approximately 7:00 o'clock?
A. 7:00 o'clock I was home and received a telephone call from Sergeant Borden. In response to that call Officer Nelson came to my house and accompanied me to the vicinity of 1831 Williams.
Q. Were you driving the car? A. I was in the police car, yes, sir.
Q. Where did you park your car?
A. Parked the car on the grounds of the Presbyterian Hospital which is just to the north of the residence on 1831 Williams in such a way that we could observe the front entrance of 1831 Williams.
Q. About what time did you arrive there?
238] A. Got in position on the hospital grounds at approximately a quarter to 8:00.
Q. Then what happened? A. Well, we were sitting there and watching the front of the house. At approximately 9:00 o'clock we were informed that entry had been made to 1831 Williams. At that time we proceeded down Williams, parked in front of the house, went to the side entrance of 1831 Williams, and --
Q. Now, referring to the side entrance, Government's Exhibit 11, is that -- A. That's correct, that is what I am referring to, as the side entrance.
Q. Then where did you go? A. As I entered the door on the side here I went directly down a stairs which was straight ahead and into the apartment which had a sign on it "Manager's Apartment, Apartment No. 1," as I recall.

Q. Is that Government's Exhibit 12?

A. That's correct.

Q. Did you go into that apartment? A. I did.

239] Q. Who was present at that time? A. Well, at that time in the apartment were the officers, Sergeant Borden, Detectives Nelson, Norden, Russell, those were the police officers present, and within the apartment were Mr. Gaitan, Mrs. Gaitan, Mr. Emmett, Mr. Silva, a lady by the name of Bertha Chavez, and a Wayne Brantley. As I recall, another subject was brought in shortly thereafter from outside, a Patty Miller.

Q. Who brought her in? A. Detective Dill.

Q. Then what happened there? Just state.

A. Well, at that time I was informed that upon entry to the apartment that a can --

Q. In whose presence was this? Just state what you did.

A. It was in the presence of the officers as I entered the door.

Q. Just state what you did.

A. Then I went downstairs and I started to search. There is a kitchen with a bathroom off of the kitchen, a utility room off to the left as you come out of the doorway, a manager's apartment, and a furnace room to the right, and directly underneath the stairway or directly to the side of the stairway coming down under the stairway, coming down the other side of the house was a closet, and that closet had a lock upon it. The other officers, Detectives Nelson and Norden were left in the

240] living room where all of the other people were present. Detectives Dill, Russell and Sergeant Borden and myself were in the other three rooms. I went back into the apartment and asked Mr. Gaitan if he had a key to the locker or the closet that went underneath the stairway. He said he did and showed me the key. I opened that closet, searched the closet. There was nothing in there. I had looked into the utility room, I had looked into the furnace room, and there was an officer in each of those. When I finished my examination of the closet I went back into the front room and started to search the front room. I was searching over by the bed.

Q. Referring to Government's Exhibit 15 can you state where the people were seated if you remember?

A. The majority of the people were seated on the divan here. Mr. Gaitan was seated here. As I recall, there was a chair in this empty space. He was seated on that chair, and that is my recollection of the way they were seated at that time. I proceeded around the corner of the bed, searched.

Q. Handing you Government's Exhibit 14 and Government's Exhibit 13 and Government's Exhibit 16, are those three pictures of the interior of that room? A. Yes, they are.

241] Q. Just referring to those exhibits state to the Court and Jury what you did.

A. Government's Exhibit 14, which shows the corner of the bed, we searched over by the bed. There was a little, I started in this corner of the room to make my search, I went to the corner and I made a search, I lifted the pillows and the cover on the top of the bed, found nothing, and continued back around, came over to this part here, searched in here underneath these papers, picked the papers up to see there was nothing concealed in the papers, pulled out the drawers and made a cursory search of the drawhers.

At approximately that time I noticed the door behind the crib on the opposite side of the room. I asked Mrs. Gaitan -- the baby was in the crib at the time -- I asked Mrs. Gaitan if she would move the crib so that I could check behind the door. She did that, and, as I walked to the door, Mr. Gaitan stated, "There is nothing behind there. The only person that ever goes in there is the meterman." I told him, well, I was going to make the check at any rate. When I opened the door upon opening the door I found immediately in front of setting about, oh, I would judge that high, a large sack containing a bulk of green matter with a smaller sack that was round and crimped approximately that round and approximately that wide in that opening.

242] (Object marked Government's Exhibit 23 for identification.)

Mr. Pfeiffer: Let the record show I hold a package that is sealed and marked Government's Exhibit 23, and at this time I open it. I remove a sack that I ask the reporter to mark Exhibit 23-A.

(Object marked Government's Exhibit 23-A for identification.)

Q. Captain Nelson, I hand you what has been marked as Government's Exhibit 23-A, and I wish you would open that and examine it and state whether or not you can identify it.

A. These are the identical sacks that I removed from behind the door opening out of the apartment.

Q. What happened, what did you do after you saw them up there? A. When I saw the sacks I picked the sacks up in this manner, turned around going back or facing back into the apartment, I never left the apartment, but I reached into the opeining to pull these out. At that time Mr. Gaitan says, "Whatever that is it does not belong to me." I said, "What is it?" He said, "I don't know what it is. Whatever it is it is not mine." I then took the sack and set the sacks on the bed, took out a pen that I had and was initialling and marking the time for identification purposes. At that time Mr. Gaitan stated, "If it is hot, it is not mine." I said, "What is not yours?" He said, "Whatever you have got, if it is hot, it doesn't belong to me."

* * * * *

258] MATTHEW J. GRESS, a witness called on behalf of the Government, being duly sworn, testified as follows:

Direct Examination By Mr. Pfeiffer:

Q. Would you please state your name?
A. Matthew J. Gress.
Q. Where do you live? A. Denver, Colorado.
Q. Are you married? A. I am.
Q. Family? A. Yes.
Q. By whom are you employed? A. By the Bureau of Narcotics, U. S. Treasury Department.
Q. And in what capacity? A. Narcotics Agent.
259] Q. How long have you been a Narcotics Agent?
A. For about five and a half years.
Q. Directing your attention to the evening of February 5, 1957, I will ask you if you received a phone call.
A. I did.
Q. And from whom? A. From Detective Borden.
Q. You recognized his voice? A. Yes.
Q. Did you later have occasion to make a phone call?
A. Yes, I called Detective Borden back.
Q. What number did you call? A. I called him at DU 8-3536.
Q. Then what did you do? Did you have occasion to go --
A. I did, after completing that phone call I left my residence and drove to 1831 Williams Street.
Q. What did you do then? A. Then I entered the residence from the front, walked down into the basement apartment.
Q. Then what happened? A. When I entered the basement apartment I met Captain Nelson who was inside the room in the basement.

Q. Did you subsequently leave? A. I did.

260] Q. And when was that? A. I left approximately, oh, one-half hour or so after I arrived.

Q. Where did you go? A. From there I went to the Police Department.

Q. How did you get to the Police Department?

A. I rode with Captain Nelson, the defendant Joe Gaitan, and his wife and Detective Nelson.

Q. What did you do after that? A. I was at -- after I left the Police Department?

Q. Yes. A. I went out into the parking lot of the Police Department there on 13th and Champa, and I searched the 1956 Ford.

Q. Who was with you at that time? A. Agent Ford was with me.

(Envelope marked Government's Exhibit No. 24 for identification.)

Mr. Pfeiffer: Let the record show I hold in my hand what is Government's Exhibit 24 which is a sealed envelope and at this time I open it.

261] Q. Agent Gress, I hand you what has been marked as Government's Exhibit 24 and ask you to examine the contents thereof and state whether or not you can identify it.

A. This is residue that I cleaned up from the floor of the 1956 Ford car.

Q. By the floor what part of the car?

A. In the back seat, and, rather, on the back floor.

* * * * *

277] JOHN W. MARSH, a witness called on behalf of the Government, being duly sworn, testified as follows:

Direct Examination By Mr. Pfeiffer:

Q. Would you please state your name?

A. John W. Marsh.

Q. Where do you live? A. 1225 Dahlia Street, Denver, Colorado.

Q. Are you married? A. I am.
278] Q. Do you have a family? A. I have.
Q. By whom are you employed? A. The U. S. Treasury Department, Bureau of Narcotics.
Q. How long have you been, well, in what capacity?
A. Narcotics Agent.
Q. How long have you been a Narcotics Agent?
A. 29 and a half years.
Q. Were you on duty February 6, 1957?
A. I was.
Q. What did you do? Did you have an occasion to go down to the Police Building? A. I did.
Q. Who went with you? A. Agent Gress. Let's see, Agent Gress didn't go with me that morning. Supervisor Wilson went with me that morning.
Q. By Supervisor Wilson whom do you mean?
A. Bureau of Narcotics.
Q. What did you do upon arriving there? A. I had a conversation with Aniseto Silva.
Q. Do you see him in the courtroom at this time?
A. Yes, sir, he is the man sitting at the end of the table in the brown coat.
Q. How was he clothed at that time?
279] A. I don't recall just, he had on a suit coat and trousers and a sport shirt.
Q. What did you do with him if anything?
A. I removed the debris from all of the pockets of his coat and trousers and his shirt.

(Envelope marked Government's Exhibit No. 29 for identification.)

Mr. Pfeiffer: Let the record show I hold in my hand what has been marked as Government's Exhibit 29 and appears to be a sealed envelope. At this time I open it.

Q. Agent Marsh, I hand you what has been marked Government's Exhibit 29. I would like to have you examine the envelope and contents thereof and state whether or not you can identify it. A. I can.
Q. And what is inside? A. This inside contains seven small packets which contain the debris taken from defendant Silva's clothing by me on February 6, 1957, at the Intelligence Unit, Denver Police Department.

Q. What did you do with that?

A. I took these and examined them under microscope to determine what they were.

280] Q. And how long have you been, well, what did you do after that, Agent Marsh? A. I kept them in my possession. On the following day, February 7, 1957, I sealed them in this evidence envelope in the presence of Agent Gress. I kept them in my custody until April 9m 1957, at 2:35 p.m. when I turned the sealed envelope and contents over to Mr. Clayder of the Food & Drug Administration. Mr. Clayder returned the envelope and contents to me on April 10, 1957, 9:50 a.m. I retained it in my custody until I brought it into the courtroom.

Q. Did you have an occasion that day to see Joe Anthony Emmett? A. I did.

Q. When was that? A. Later on the same day at the Intelligence Unit, Denver Police Department.

Q. Who all was present at that time?

A. Captain Nelson was present and myself and Joe Anthony Emmett.

(Envelope marked Government's Exhibit No. 30 for identification.)

Mr. Pfeiffer: Let the record show I hold in my hand a sealed manila envelope which has been marked as Government's Exhibit 30. At this time I will open it.

281] Q. Agent Marsh, I show you what has been marked as Government's Exhibit 30 and the contents thereof and ask you to examine the contents thereof and ask you if you can identify it. A. I can.

Q. What is that? A. This envelope contains four small packets containing debris which was removed by me in the presence of Captain Nelson from the clothing of defendant Joe Anthony Emmett who sits behind Mrs. Gaitan on the left side of the table on February 6, 1956, at 4:15 p.m. at the Denver Police Department.

Q. Then what did you do with it? A. I examined the contents under a microscope, kept them in my possession, sealed them in the evidence envelope on February 7, 1957, in the presence of Agent Gress, kept them in my custody until February 9, until April 9, 1957, at which time I delivered the sealed envelope to Mr. Clayder, a chemist for the Food & Drug Administration. He returned the envelope and contents to me on April 10, 1957, at 9:50 a.m. I retained it in my custody until I brought it into

the courtroom today.

* * * * *

284] Q. Did you have an occasion to have a conversation with the defendant, Aniseto Silva? A. I did.

Q. When was that? A. On February 8, 1957.

Q. Where was that? A. At the Intelligence Unit Office of the Denver Police Department.

Q. Who was present? A. Agent Gress. I believe Agent Gress, myself, and the defendant Silva.

Q. Did you say anything to him at that time?

A. Yes. The defendant was advised of his rights, that he did not have to make any statement, that any statement he made could be used against him, that he was entitled to the advice of an attorney before making any statement. I told him that I had learned that he received $80.00 by Western Union money order on December 31,1956, from Dolores Gaitan and Joseph Gaitan, and he said, "Well, I got some money from them, but you can get money for a lot of things. It doesn't have to be marijuana."

* * * * *

285] CLEMENT J. CLAYDER, a witness called on behalf of the Government, being duly sworn, testified as follows:

Direct Examination By Mr. Pfeiffer:

Q. Would you please state your name?

A. Clement J. Clayder.

Q. Where do you live? A. Denver, Colorado.

Q. By whom are you employed? A. The U. S. Food and Drug Administration, Department of Health,Education, and Welfare.

Q. And in what capacity? A. I am a chemist.

Q. Now, what is your formal education in regard to chemistry?

A. I graduated from the University of Kansas 1938 with Bachelor of Science in Chemical Engineering.

Q. How long have you been with the Food & Drug Department?

286] A. About 17 and a half years.

Q. What did you do after you left, after you got out of college? A. I worked for an oil refining company down in Houston, Texas, for a couple of years and since then --

Q. In what capacity? A. Pipe fitter helper and also a helper

in the laboratory.

Q. What are your duties with the Food and Drug Department?

A. I analyze foods, drugs, and cosmetics for compliance with the food and drug law.

Q. Have you had occasions to examine substances to determine whether or not they are marijuana?

A. Yes, sir.

Q. About how many times? A. Oh, over a hundred times.

Q. How many times have you testified in this Court as to whether or not a substance is marijuana?

A. About fifty.

Mr. Pfeiffer: Do you have any questions?

Mr. O'Neill: He is your witness.

Mr. Pfeiffer: We offer him as an expert. Do you have any questions on voir dire?

The Court: If they object, then we will talk about it. Proceed.

287] Q. I will hand you what has been marked as Government's Exhibit 23 and 23-A, and I will ask you to examine those and state whether or not they ever came into your custody or in your possession. A. Yes.

Q. And did you examine the contents of Government's Exhibit 23? A. Yes.

Q. When was that? A. On the 10th of April.

Q. When did that come into your custody?

A. On the 9th.

Q. Who gave it to you?

A. Mr. John Marsh.

Q. And what sort of an examination did you make of it?

A. I made a microscopic and chemical examination.

Q. What were your findings? A. Marijuana was present.

Q. That is in both the big package and the little package?

A. Yes, sir.

Q. Then what did you do with the exhibit after you got through with it? A. I sealed it in that package there and returned it to Mr. Marsh.

Q. Handing you what has been marked as Government's 288] Exhibit 30 I will ask you to examine that and the contents thereof and state whether or not that has come into your custody.

A. I received this exhibit the same time as the other one, and these small papers contained parts of plant material. Three of them showed marijuana present, and one of them did not have marijuana.

Q. One of them did not have marijuana?

A. Yes, sir.

Q. Handing you what has been marked as Government's Exhibit 29 I ask you to examine that and the contents thereof and state whether or not it has come into your custody.

A. I received this exhibit at the same time as the other one, and these small paper-wrapped packages contained plant material, and five of them showed a positive microscopic test for marijuana and two of them negative.

Q. What did you do with Government's Exhibit 29?

A. It was resealed and returned to Mr. Marsh on the 10th.

Q. I hand you what has been marked as Government's Exhibit 24 and ask you to examine that, the contents thereof, and state whether or not that has come into your custody.

A. I received this envelope in the sealed condition from Mr. Marsh and made an examination of the contents of this, and it contained marijuana.

289] Q. Did you weigh the contents thereof? A. No, I did not.

Q. Then what did you do with this exhibit?

A. It was sealed and returned to Mr. Marsh.

Q. I hand you what has been marked as Government's Exhibits 18 and 18-A which is inside there, and I will ask you if it has come into your custody. A. I received this at the same time as the other exhibits and made a chemical and microscopic test of the contents, and I found it contained marijuana.

Q. Then what did you do with Government's Exhibit 18?

A. Resealed it and returned it to Mr. Marsh.

* * * * *

296] The Court: The Jury will recall that at the time we recessed last night the Government had just before the recess offered in evidence Exhibits 3 and 4, is that right?

Mr. Pfeiffer: Exhibits 3, 4, and 5.

The Court: They had offered in evidence Government's Exhibits 3, 4, and 5, and I indicated at the time that I would hear counsel in Chambers, and we have discussed the matter, and

the Court has decided to overrule the objections of the defendants to the admission of these Exhibits 3, 4, and 5, and they will be received in evidence.

(Government's Exhibits Nos. 3, 4, and 5 for identification received in evidence.)

Mr. Pfeiffer: The Government will offer Government's Exhibits 1 and 2. Is there any objection to those?

Mr. O'Neill: There are no objections to those exhibits, Government's Exhibits 1 and 2.

The Court: Very well, they will be received in evidence.

(Government's Exhibits Nos. 1 and 2 for identification received in evidence.)

The Court: You may proceed with the testimony if there is no objection as to all defendants.

Mr. Lawther: No objection.

297] Mr. Pfeiffer: The Government will also offer Government's Exhibits Nos. 18, 18-A, 23, 23-A, 24, 29, and 30. Those are the evidence envelopes and the various matters that have been identified as marijuana.

The Court: Is there any objection to the admission of those exhibits?

Mr. Lawther: No objection.

Mr. O'Neill: There is no objection with the exception of the debris taken from the pocket of Mr. Silva. They testified to the amount of it being so insignificant that it doesn't have any bearing as to materiality in the case here.

The Court: That goes rather to the weight of the evidence than the admissibility. I think the objection will be overruled, because I recall the testimony you are talking about, but he did testify there was something less than a grain of marijuana in that particular exhibit, and I think that is a question for the Jury with respect to whether that would constitute

marijuana in the sense the statute has in mind. That objection to Exhibit 29 will be overruled. I understand there is no objection to the others.

Mr. O'Neill: No, your Honor.

The Court: They will all be admitted in evidence.

(Government's Exhibits Nos. 18, 18-A, 23, 23-A, 24, 29, and 30 for identification received in evidence.)

* * * * *

324] JOSEPH AGUILAR GAITAN, one of the Defendants, called in his own behalf, being duly sworn, testified as follows:

Direct Examination By Mr. O'Neill:

Q. Will you state your name, please?
A. Joseph Aguilar Gaitan.

* * * * *

328] Q. Have you ever been convicted of a felony, Joe?
A. Yes, sir.

* * * * *

346] Cross Examination By Mr. Pfeiffer:

* * * * *

356] Q. I believe you stated you have been convicted of a felony?
A. Yes.
Q. Have you been convicted of more than one felony?
357] A. Yes.
Q. How many times have you been convicted of a felony?
A. Two times.

* * * * *

369] ANISETO SILVA, one of the Defendants, called in his own behalf, being duly sworn, testified as follows:

* * * * *

Cross Examination By Mr. Pfeiffer:

Q. Mr. Silva, did you state, I think you stated you had a conversation with Private Schriewer, is that his name?
380] A. Yes.
Q. And you saw him testify here yesterday, I believe?
A. Yes.
Q. That was the same person you borrowed the car from, is that correct? A. That's correct.
Q. Now, at the time you did have a conversation with him prior to borrowing his car on the 1st of February -- is that right? A. That's right.
Q. -- at that time did you tell him that you wanted to borrow his car to drive around El Paso and Juarez?
A. I did not tell him that, because he knew I was driving that car around Juarez and El Paso.
Q. You had driven his car around El Paso and Juarez?
A. I did. I have had that car since January.
Q. And Juarez is across in Mexico? A. Right. Actually, I never drove it anywhere around Juarez. I drove it into the parking lot in Juarez.
Q. You state that you asked him if you could borrow the car to go to Albubuerque? A. That's correct.
Q. Was there any conversation about your own car?
381] A. Yes, I told him that one of the valves of my car was no good, broken or something. I told him would he loan his car to go to Albuquerque. He said at the time he did not know. I told him, "Well, are you going to lend it to me?" He said, "yes". I says, "How about loaning me your car papers?" At that time he ran inside the barracks where all the men are at and got his papers from his foot locker. When he returned to me he gave them to me.
Q. He gave you the papers to the car?
A. Yes.
Q. Did you take the clothing out of the car?
A. I took his clothing out about a week and a half before that time.
Q. You took the clothes out? A. I did.
Q. Actually, from about the time he arrived there in January,

why, you used his car most of the time, didn't you?
A. That's right.
Q. I think you testified you phoned or made a telephone call on the 31st, you called Joe Gaitan from Pueblo?
A. That's right.
Q. Was it a collect telephone call? A. That's right.
382] Q. Where did you call from? A. From Lincoln 34217.
Q. Are you sure it wouldn't be Lincoln 29819? What is the number? A. Lincoln 34217.
Q. About how long did you talk?
A. It wasn't too long.
Q. It wasn't too long? A. No.
Q. You made another phone call to Joe Gaitan, didn't you?
A. I did.
Q. Was that about February 4? A. It was.
Q. It was from Dallas, Texas, wasn't it?
A. That's right.
Q. So, actually, you after you borrowed the automobile you went down to Dallas, Texas, didn't you?
A. That's right.
Q. You picked up Joe Emmett in El Paso, didn't you?
A. No. I met Joe Emmett in Dallas, Texas.
Q. You met him in Dallas, Texas?
A. I did.
Q. Where did you meet him? A. Downtown some place. I
383] forget the club--the Dragon.
Q. The Dragon Club?
A. Yes.
Q. Was there a man by the name of Parker there?
A. There was nobody with him at the time.
Q. You met Joe Emmett in El Paso before, hadn't you?
A. I did.
Q. And he was working in El Paso, wasn't he?
A. Yes, he was. That is what he told me anyway.
Q. Now, both of you people stayed at the Newlang Motel, didn't you? A. That's correct.
Q. And you stayed there, you went in there about midnight or a little after midnight on February 2, registered in there?
A. That is about right.
Q. Actually, Joe Emmett registered in the motel, is that correct, he went in and registered, or do you know? Did you go in? A. No, I didn't.
Q. You didn't? A. No.
Q. Do you remember the room number you stayed in there?

A. It was either 19 or 18.
Q. Room 18 or 19? A. Yes.
384] Q. Now then, you left, didn't you, well, you stayed there in a twin-bedded room? A. Yes, it was.
Q. And then that next day you left, is that correct?
A. That would be a Sunday, wouldn't it?

* * * * *

Q. After the night you stayed there, you stayed there one night and then you left the motel, is that right?
A. No, we stayed there two nights.
Q. Did you leave and come back or what was the situation?
A. We left and came back.
Q. You stayed all night in that motel again?
A. Yes.
Q. And then you made your phone call to the Gaitan's. Who did you talk to? A. I guess it was Mrs. Gaitan. I don't know.
Q. You talked to Mrs. Gaitan? A. I think so.
Q. How long was that conversation?
A. That wasn't too long either.
Q. About what time of day did you make the phone call,
385] just after noon? A. About in the morning.
Q. In the morning? A. Yes.
Q. You are sure it wasn't 12:43 or 12:45 or so?
A. No, I just got up.
Q. After you made that phone call you and Emmett left for Denver, didn't you? A. No. I asked Emmett to come along with me to go to Denver, and, well, we had a slight conversation between him and me, and we came on to Denver.
Q. You drove on to Denver, is that right?
A. That's correct.
Q. Upon arriving at Denver you arrived at the Gaitan's, didn't you? A. That's correct, yes.
Q. What time did you get to the Gaitan's?
A. Between 3:00 and 4:00.
Q. 3:00 and 4:00? A. Yes.
386] Q. Now then, you went on down, you had been there before. Had you been to the Gaitan's before?
A. Down in his apartment?
Q. Yes. A. No, not exactly, I haven't been there before, but I knew where he lived at.

* * * * *

Q. How did you get down to his apartment?
A. I just walked into the front door, took a left and took another left and took another left.
Q. When you walk in you take a right and then you turn to your left and turn to the left and go down the stairs. Was the door at the top of the stairs open?
A. Yes.
Q. It wasn't locked? A. No.
Q. You parked your car out in front? A. The car?
Q. Yes. A. The car was parked at the door.
387] Q. But you walked around to the front and went in, is that right? A. That's right.
Q. Then did you and Emmett subsequently come out again?
A. No. The last time we come out was when Mr. Gaitan and Emmett and myself came out to go to Safeway.
Q. You and Emmett came out by yourself, I mean you and Emmett and Mr. Gaitan came out and got in the car and drove over to Safeway, is that correct? A. Yes.
Q. Then you ame back? A. Yes.
Q. Who drove the car at that time? A. I think it was Emmett.
Q. Emmett drove the car at that time?
A. I think so.
Q. You say that when the police officers searched you they took the key off of you. Was that the key to the car?
A. Yes.
Q. Had you locked the car? A. I don't recall.
Q. You don't know whether you did or you didn't?
388] A. No.
Q. You didn't go to Albuquerque at all, did you?
A. We came through there.
Q. You went to Dallas first, didn't you?
A. That's correct.
Q. Well, let's see, you drove from Dallas to Denver. What towns did you go through?
A. You have to go through, gee, a whole bunch of little towns.
Q. Amarillo, Texas? A. No, not through Amarillo.
Q. Did you go through, come over Raton Pass?
A. I did.
Q. And then did you drive on down to Albuquerque?
A. I drove to Dallas.
Q. Drove from Albuquerque up? A. Up where?
Q. Up to Raton Pass to Trinidad and that area. A. Right.

Q. Now, from where did you drive into Albuquerque?
A. From Dallas.
Q. You have told us that you have driven to Denver a lot since you have been down at Fort Bliss?
A. Yes.
389] Q. Every time you get leave you come to Denver?
A. Yes.
Q. What route do you take from El Paso?
A. 85.
Q. You go through Albuquerque to come up here?
A. That's right.
Q. But you went through Dallas, when you came from Dallas, Texas, you went through Albuquerque, is that right?
A. That's right.
Q. About how many times in the last six months have you driven up to Denver? A. The past six months?
Q. Well, from, say, six months prior to February 5 of 1957.
A. Two times.
Q. Just two times? A. That's correct.
Q. When were those? You came up on the 5th or the 4th or 5th? A. I come up here on the 5th.
Q. You came up here on the 5th?
A. The 5th of February.
Q. When did you come before? A. Christmas leave. That would be the 23rd.
Q. The 23rd, is that right? A. Yes.
390] Q. You came to Denver? A. I did.
Q. Did you see Joe Gaitan? A. No, I didn't.
Q. When did you leave after your Christmas leave to go back to Fort Bliss? A. I left the 5th of January.
Q. You left the 5th of January? A. Yes.
Q. Did you come up to Denver between the 31st and the 5th?
A. No, I didn't.
Q. Handing you Government's Exhibit 2, that is your signature on there, isn't it? A. That's right.
Q. Isn't that a receipt for the money order or the Western Union money order that you received? A. I didn't get no receipt.
Q. Didn't you sign a receipt when you got your money from Western Union? A. I did.
Q. That was on the same night you made the phone call, wasn't it? A. No. When I received the money order was the next day.
Q. You received the money order the next day?
391] A. I did.

Q. Did you know Dolores Gaitan before this?
A. No, I did not. The first I met her was the 5th of February.
Q. You talked to her over the telephone once, didn't you?
A. Yes.
Q. You knew who she was? A. I figured it was his wife.

* * * * *

392] DOLORES MARY GAITAN, one of the Defendants, called in her own behalf, being duly sworn, testified as follows:

Direct Examination By Mr. O'Neill:

* * * * *

398] Cross Examination By Mr. Pfeiffer:

* * * * *

401] Q. Now, handing you Government's Exhibit 1, that is your signature down there, isn't it? A. Yes, it is.
Q. I wish you would examine that and state whether or not that is an application that you made out to send a Western Union money order to Mr. Aniseto Silva.
A. Yes, it is.
Q. And that is when you sent this money down to Mr. Silva, is that right? A. Yes.
Q. Now, had you talked to Mr. Silva before that?
A. Before that you mean?
402] Q. Yes. A. No, I never did.
Q. Had you talked to him after that? Did you talk to him -- you didn't talk to him over the telephone this time, did you?
A. No, I didn't.
Q. When was the next time you talked to him?
A. Oh, that was about, a little before that the cops went over there. That must have been about the 4th.
Q. February 4? A. Yes.
Q. Did you recognize his voice? A. No, I didn't. I never knew him. He called and he asked for Joe, and I told him, "Well, he is not here right now. Would you like to leave a message?" He says, "You tell him I might be in tomorrow." So, I said, "Who shall I say is calling?" And he says, "Just tell him Aniseto Silva will probably be there."

Q. But you accepted a collect call from him, is that right? A. Well now, when you get a collect call they don't announce it over the telephone.

Q. They didn't ask you? A. No.

* * * * *

416] (Mr. Pfeiffer presented closing argument on behalf of the Government.)

* * * * *

439] You may recall that when Mr. Gaitan was on the stand he admitted that he had been convicted of a felony. Now, I wish to call your attention to this: that under the law this circumstances can only be considered by you as affecting the credibility of Mr. Gaitan. He is entitled to be tried upon the charge named in the indictment and none other, and you may consider the fact of his former conviction as bearing only upon his credibility as a witness and for no other purpose.

* * * * *

457] Plaintiff's Exhibit 1.
1956 DEC 31 PM 5 38

Acctg.	Infm.	Check	Office	Date and Filing Time	$Amt.	80.00
VI	1		DV Denver, Colo	Dec 31 1956	Chgs.	1.00
				5 PM	Tolls	.95
MOD	Pueblo Colo		MOD Denver, Colo		Tax	.10
						.02
						.01
					Total	82.08

Do Not Write Above This Line

Pay Amount: Eighty (80) CAN
To: Annieset Silva (TQR)
Address: Western Union Pueblo Colo
Sender's Name: Joe Gaitan (Gaitan)
Deliver The Following Message With The Money: MOD
Gov't Ex 1 #18236

Unless signed below the Telegraph Company is directed to pay this money order at my risk to such person as its paying agent believes to be the above named payee, personal identification being waived.

Dolores Gaitan
1831 Williams St.

Information for test question: _____
c

Plaintiff's Exhibit 2.

Govt Ex 2

The Western Union Telegraph Company #15235
Money Order Receipt

Wire No.
K DVA587 Issued At Pueblo, Colo Dec 31 1956

Payment received for the following described telegraphic money order from:

Joe Gaitans Denver Colo Dec 31 1956 - $80.00

Issuing
Employee MAM

Annieset Silva
Signature Of Payee
c

Reverse side read: Paid Jan 17 '57 02004
Western Union Telegraph Co.

Photostat to
Date Feb 18 1957
Photostat to
Date Feb 26 1957

[Plaintiff's exhibit 19 is the police record of Aniseto Silva. Plaintiff's exhibit 20 is the police record of Joe Anthony Emmett. Plaintiff's exhibit 21 is the police record of Dolores Mary Gaitan. Plaintiff's exhibit 22 is the police record of Joseph Aguilar Gaitan. Three photostatic copies of these police records have been filed for the use of the court.]

490] Clerk's Certificate.

I, G. Walter Bowman, Clerk of the United States District Court for the District of Colorado, do hereby certify the foregoing pages, numbered one (1) through four hundred-eighty nine (489) both inclusive, are the originals of the record and proceedings as designated by counsel, in a certain case lately in said Court pending, wherein The United States of America was the plaintiff and Joseph Aguilar Gaitan, Delores Mary Gaitan, Aniseto Silva and Anthony Emmett were the defendants, Criminal Action Number 15235.

In Testimony to the above, I do hereunto sign my name and affix the seal of said Court, at the City and County of Denver in said District, this 21 day of August, A.D., 1957.

(Seal)

G. Walter Bowman,
Clerk
By: William Graf
Chief Deputy Clerk

Filed United States Court of Appeals Tenth Circuit August 22, 1957, Robert B. Cartwright, Clerk.

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IN THE

Supreme Court of the United States

October Term, 1957

JOSEPH AGUILAR GAITAN, *Petitioner*,

v.

UNITED STATES OF AMERICA

DOLORES MARY GAITAN, *Petitioner*,

v.

UNITED STATES OF AMERICA

ANISETO SILVA, *Petitioner*,

v.

UNITED STATES OF AMERICA

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Florence P. O'Neill,
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IN THE

Supreme Court of the United States

October Term, 1957

JOSEPH AGUILAR GAITAN, *Petitioner*,

v.

UNITED STATES OF AMERICA

DOLORES MARY GAITAN, *Petitioner*,

v.

UNITED STATES OF AMERICA

ANISETO SILVA, *Petitioner*,

v.

UNITED STATES OF AMERICA

PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Petitioners pray that writs of certiorari issue to review the judgments of the United States Court of Appeals for the Tenth Circuit, affirming their convictions for violation of 26 U.S.C. Sec. 4742 (a); the Gaitans also 26 U.S.C. Secs. 4744 (a) (1) and 4744 (a) (2); Silva also 26 U.S.C. Secs 4744 (a) (2) and 4742 (a).

Opinion Below

The opinion of the Court of Appeals (App. A) has not yet been reported.

Jurisdiction

The judgment of the Court of Appeals was entered January 23, 1958 (App. B). A petition for rehearing was denied on February 8, 1958 (App. C). The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1254 (1).

Questions Presented

1. Whether evidence secured by illegal search and seizure by state officers is admissible in a federal court.

2. Whether evidence secured by illegal search and seizure by state officers handed to federal officers who entered without a search warrant is admissible in a federal court.

3. Whether violation of the due process clause of the Fifth Amendment occurs when the character of the defendants is assailed by the presentation in the government's case-in-chief of exhibits showing prior arrests of the defendants.

Constitution Involved

Amendment IV:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures shall not be violated, and no warrants shall issue, but upon probable cause supported by oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized."

Amendment V:

". . . nor shall any person . . . be deprived of life, liberty, or property, without due process of law. . . ."

Statement

On February 20, 1957, the Grand Jury for the District of Colorado returned an indictment in five counts charging all the petitioners with a conspiracy to unlawfully sell marihuana, in violation of 26 U.S.C. Sec. 4742 (a) and 26 U.S.C. Sec. 7237. Petitioner Silva was charged also with unlawfully acquiring marihuana, in violation of 26 U.S.C. Sec. 4744 (a) (2), and unlawfully transferring marihuana, in violation of 26 U.C.S. Sec. 4742 (a). Petitioners Gaitans were also charged with unlawful acquisition of marihuana, in violation of 26 U.S.C. Sec. 4744 (a) (1), and unlawful concealment of marihuana, in violation of 26 U.S.C. Sec. 4744 (a) (2).

Most of the facts in this case concerning illegal searches and seizures are not in dispute.

Officers of the Denver Police Department had the Gaitans' premises at 1831 Williams Street under surveillance with binoculars and a walkie-talkie (R. 71).* At 8:45 p.m. on February 5, 1957, Denver Police Officers arrested petitioner Silva and another person as they emerged from the side entrance of the apartment house in question (R. 48). There was no warrant of arrest or search.

The same officers forcibly entered the Gaitan apartment without a warrant for arrest or search (R. 39). A search was conducted and six pounds of marihuana were found in an unexcavated portion of the basement adjacent to the Gaitans' basement apartment (R. 50, R. 40).

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* "R." refers to the record filed below.

During this time of search, the Federal Bureau of Narcotics was contacted by telephone (R. 46, 32). Two federal agents entered the Gaitans' apartment without the owners' permission and, without a search warrant, "observed" and "looked" (R. 32, 34). Federal agent Gress accompanied the Gaitans in a police car "assisting Captain Nelson to take them to the police department" (R. 36).

Upon arriving at the police station, the federal agents went to the Police Department parking lot and searched Silva's car and seized certain evidence without Silva's permission and without a warrant (R. 89).

Before the trial, petitioners' motion to suppress the evidence on the basis of cooperation between state and federal officers, all of whom had no search warrants, was denied (R. 11-12). The Court felt that no federal officer had participated in the illegal search and seizure.

At the trial, during the government's case-in-chief, there were produced and marked before the jury four (4) exhibits (R. 81), each of which contained four (4) other exhibits. They were prejudicial and inadmissible (R. 84). Still the Court denied petitioners' timely motion over objection for a mistrial on the basis that the jury was not influenced, even though he was not in a physical position to see the exhibits and their close proximity to the jury box (Stipulation for Supplemental Record, p. 2).

The exhibits were Arrest Records, Photographs of Petitioners, with DENVER POLICE written thereon, Denver Police Department Complete Arrest and Disposition Records, the United States Department of Justice, Federal Bureau of Investigation, Arrest Charge and Disposition Record, and complete black and white photographs of petitioners' fingerprints, which were all marked as GOVERNMENT'S EXHIBITS 19, 20, 21, and 22.

The jury found the petitioners guilty of all counts alleged in the indictment. Petitioner Joseph A. Gaitan was sentenced for a term of ten (10) years, his wife was sentenced for five (5) years, and Silva was sentenced for five (5) years (R. 16. 17, 18).

The Court of Appeals found that neither state nor federal officers had search warrants, but that the state completed its search and seizure by the time the federal officers arrived, thus there was lacking a decisive factor necessary to show federal participation in the illicit acquisition. (See App. A)

Reasons for Granting the Writ

Opinions in this Court have repeatedly reflected an awareness of the dangers of encouraging lawlessness on the part of state and federal officers in prosecutions based on illegal searches and seizures.

1. This Court has commented in a recent case, that "It has remained an open question in this Court whether evidence obtained solely by the state agents in an illegal search may be admissible in Federal Court, despite the Fourth Amendment. See *Lustig v. United States,* 338 U. S. 74, 78-79." *Benanti vs. United States,* 28 Sup. Ct. 155, 2 L. Ed. 2d 126, footnote 10. It is vital that an answer be given to this question, the present confused status of which is sowing official lawlessness in our society and in our courts.

It is well settled that the fruit of an illegal search and seizure by federal officers is inadmissible in a federal court. *Weeks vs. United States,* 232 U. S. 383.

It has also been held that if there is attendant federal activity incident to the search even though the state officer alone turns up the evidence, there is an illegal search and

evidence so obtained is inadmissible in a federal court. *Lustig v. United States,* 338 U. S. 74.

The Circuits are in hopeless conflict on this question and seem to be guided solely by factual interpretation as to whether or not a federal official had a hand in the search. In the following cases an illegal search was found: *Gambino v. United States,* 275 U. S. 310; *Sutherland v. United States,* D. C. 1955, 219 F. (2d) 37 and *United States v. Amoia,* 91 F. Supp. 223.

On the other hand, the same doctrine brought opposite results in *Jones v. United States,* 8 Cir. 1954, 217 F. (2d) 381; *Symons v. United States,* 9 Cir 1949, 178 F. (2d) 613; and *Gilbert v. United States,* 10 Cir. 1947, 163 F. (2d) 615.

Dicta in Lustig has been seized upon recently by the trial courts and the Circuits. It is the "silver platter" doctrine which states that there has not been an illegal search by a federal officer if evidence is secured by State authorities and turned over to the federal authorities on a silver platter.

The food on the silver platter already has been poisoned with the corruption of illegal search and seizure. Should a court of law allow the subversion of due process of law and the Fourth Amendment indirectly when it disallows it directly? This Court should protect our citizens and the sanctity of the home and private property by preserving the freedom from illegal searches and seizures so clearly demanded by the Constitution of the United States. Should federal courts ratify the lawless breaking and entering of state officers by allowing the ill-gotten fruits thereof to be introduced in a federal court of law? Until this question is firmly answered in the negative, the courts will be spawning grounds for official conspiracies to cir-

cumvent the spirit of a law which may be complied with literally.

Recently a federal officer was enjoined from testifying in a state court about his illegally seized evidence. *Rea v. United States,* 350 U.S. 214. It was also held that federal courts have the power to police its officers to the end that federal rules governing search and seizure are observed. The decisive factor should be not *who* illegally searched and seized, but that there *was* an illegal search and seizure, with the result that one of the most basic rights of the individual has been outrageously infringed.

In *Benanti, supra,* this court stated that it has remained an open question whether evidence obtained solely by state agents in an illegal search may be admissible in federal court despite the Fourth Amendment. This question, reeking with official lawlessness, encouraged by the "silver platter" doctrine, should be answered with finality by this Court. This question must be resolved once and for all if our constitutional rights have any real meaning.

2. The "silver platter" doctrine was the decisive factor in the Tenth Circuits affirmance of the court below. However, even *Lustig supra,* held that "The decisive factor in determining the applicability of the *Byars* case is the actuality of a share by a federal official in the total enterprise of securing and selecting evidence by other than sanctioned means."

In this connection the Circuit Court failed to consider the active participation of the federal officers in the illegal search and seizure by entering the premises without a warrant of any kind. Also the Court failed to consider other indicia of participation and cooperation such as telephonic communications and a search of petitioner's car by fed-

eral officers without a warrant on the evening in question. While the evidence seized from Silva's automobile was not sought to be suppressed, the method of obtaining the same is a clear indication that the federal officers were continuing the search that evening and were *cooperating* with the local police in the *entire* chain of events involved in the arrests.

3. Petitioner's were denied due process of law when one of the fundamental rules of evidence was violated. Petitioners' character was assailed before the petitioners themselves had put their character in issue. This cannot be done in a court of law and requires a mistrial. *Thompson v. Bowie,* 4 Wall. 463; *Williams v. United States,* 168 U. S. 382; *Gardner v. United States,* 253 Fed. 53.

It was not incumbent upon petitioners to show that the jurors were actually influenced by the "mug shots", police records, fingerprints etc. In *Little v. United States,* 73 F. (2d) 861, at 866, it was held:

> " . . . where error occurs which within the range of a reasonable possibility may have affected the verdict of the jury, appellant is not required to explore the minds of the jurors in an effort to prove that it did in fact influence their verdict. . . . The record failing affirmatively to disclose that no prejudice did result, the verdict cannot stand."

Petitioners feel that they were tainted with the stigma of being criminals with prior police records and criminal history before they took the stand. In fact petitioner Silva had no prior record and is a Corporal in the United States Army. Mrs. Gaitan, mother of three children had no prior record.

The process of marking the sixteen admittedly preju-

dicial exhibits took several minutes, thus, it was physically impossible that counsel for appellants "immediately" approached the bench to ask for a mistrial as stated at page 17 of the opinion. (App. A) The prejudicial exhibits were in full view of the jury for several minutes during the marking of the exhibits.

It is stated at page 17, by the lower court, that "The Court did not share in the belief that the jury had seen the exhibits or observed them to the extent that they knew the contents thereof . . ." and also that "The trial court was in much better position to observe and evaluate the effect of what had occurred . . ." *That this was not so is evident from the trial judge's own statement.* "The Court: Of course, the Court is in a position physically that I am not able to observe expressly what happened. The Court did not observe any pictures of anything in connection with the exhibits, but of course, the reporter sits in front of the Bench and the Court of course, did not see the actual marking of the exhibits, but counsel for the defendants apparently observed what they were . . ." (Stipulation for Supplemental Record, p. 2).

Thus, the trial court was not in a position to observe what happened because of his physical position on the bench.

In *U. S. v. Dressler*, 112 F. (2d) 972 at 978, the Court pursuing the same question, stated:

> "The record failing affirmatively to disclose that no prejudice did result, the verdict cannot stand."

In this case, there was no showing that there was no prejudice. In fact, the court held the exhibits *were* prejudicial and inadmissible when *later* he saw what they were. *In the crucial time when the reporter was marking the*

exhibits in full view of the jury, the Court was not in a position to observe the damage being done. Thus the lower court denied petitioners due process of law when it did not reverse the trial court's refusal to grant a mistrial.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be granted.

FRANCIS P. O'NEILL,
WALTER L. GERASH, of Counsel,

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Denver 2, Colorado,

Counsel for Petitioners.

Appendix A

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

Nos. 5709, 5710, 5711, 5728, JANUARY TERM, 1958

Joseph Aguilar Gaitan,
Appellant,
v.
United States of America,
Appellee.

Dolores Mary Gaitan,
Appellant,
v.
United States of America,
Appellee.

Aniseto Silva,
Appellant,
v.
United States of America,
Appellee.

Joe Anthony Emmett,
Appellant,
v.
United States of America,
Appellee.

Appeal from the United States District Court for the District of Colorado.

Filed United States Court of Appeals, Tenth Circuit. Robert B. Cartwright, Clerk

---

Walter L. Gerash and Francis P. O'Neill for appellant.
John S. Pfeiffer for appellee.

Before BRATTON, and PICKETT, Circuit Judges, and RICE, District Judge.

RICE, District Judge.

The appellants, defendants in the trial court, and hereinafter referred to as defendants, were charged by indictment with violations of the narcotics laws relating to marihuana. All defendants were charged with conspiracy to transfer marihuana in violation of 26 U.S.C. § 4742 (a). Joseph Aguilar Gaitan and Dolores Mary Gaitan, husband and wife, hereinafter referred to as the Gaitans, were jointly charged in Counts 4 and 5 with possession and concealment of marihuana in violation of 26 U.S.C. §§ 4744 (a)(1) and 4744(a)(2). Aniseto Silva and Joe Anthony Emmett, hereinafter referred to as Silva and Emmett, were jointly charged in Counts 2 and 3 with transporting and transferring marihuana in violation of 26 U.S.C. §§ 4744(a)(2) and 4742 (a). Each defendant was convicted as charged. Joseph Gaitan received a ten-year sentence. Each of the other defendants received a five-year sentence.

The Gaitans and Silva joined in filing, prior to trial, a motion to suppress evidence. The Gaitans filed separate but identical affidavits in support of the motion, asking that the search of their apartment be declared unreasonable, illegal, and void and that the United States Attorney be precluded from using the evidence obtained by the search against them, and alleging generally that their dwelling place was "forcibly and illegally broken into and illegally entered"; that no warrant of arrest was served or displayed by the officers, either State or Federal; that

"no search warrant was served or displayed by the State or Federal officers and that the search was a violation of the Fourth Amendment." Silva filed no affidavit but apparently relies upon the affidavits of the Gaitans.

Emmett, by his attorney, filed a motion to suppress for use as evidence "anything obtained on or about the 5th day of February, 1957, at the premises known and numbered at 1831 Williams Street, City and County of Denver in the District of Colorado, which was unlawfully seized and taken from the defendants Joseph Aguilar Gaitan and Dolores Mary Gaitan by a deputy of the United States Marshal or an agent of the Federal Bureau of Investigation . . . ." Emmett further charged that the property was seized under the authority and control of the Federal Government. Emmett's motion was not supported by affidavit. None of the defendants asserted ownership or possession of the property alleged to have been illegally seized.

The property seized was a 5 pound 14 ounce bag of marihuana found concealed in the Gaitans' apartment. A tobacco can of marihuana was found on and seized from the person of Emmett after his arrest at the entrance of the apartment building in which the Gaitans lived. On the hearing of the motion to suppress evidence, the defendants, assuming the burden of proof, endeavored to establish that the search and seizure were participated in by Federal officers. On the other hand, it was the contention of the Government that the search and seizure were conducted entirely by State officers, members of the police force of the City and County of Denver, without any participation on the part of the Federal officers. *There was never any contention that the State officers had a warrant for the arrest of any of the defendants or had a search warrant authorizing them to search the apartment in which the*

Gaitans lived, or the person of any defendant. The evidence clearly establishes that the police officers, after having had the apartment under surveillance for several hours, entered the apartment building at approximately 8:30 p.m., and arrested Silva and Emmett in the hallway leading to the apartment occupied by the Gaitans; that a tin of marihuana was found and seized from the person of Emmett, and that a bag containing 5 pounds 14 ounces of marihuana was found and seized as a result of a search of the Gaitan apartment.

After the tin of marihuana had been seized and the bag containing 5 pounds 14 ounces of marihuana had been found and seized, one of the police officers called the Federal narcotics agents, and at approximately 9:30 p.m. two narcotics agents came to the apartment. Officer Nelson, Captain of Police, stated in his testimony that before the Federal officers arrived, "our investigation was all complete." *The Federal officers, upon arrival, saw the situation as it existed. They saw the marihuana that had been seized, and thereafter accompanied the local officers and the defendants to police headquarters.* Defendants were lodged in the city jail over night under authority of the City and County of Denver. Habeas corpus proceedings were begun by some of the defendants in the State Court and hearing for others was sets for an early date. Thereupon, the Captain of the State police made a change slip and placed a hold order for the Federal narcotics agents. This change was made, according to the officer's testimony, several days later. The police officers retained custody of the marihuana, and at the time of the hearing on the motions had custody of the marihuana.

The case was tried by the Government on the theory that the search and seizure were conducted by State offi-

cers without participation by the Federal officers. The defendants contended in the trial court that there was participation by Federal officers, and by reason thereof the evidence secured as a result was inadmissible. Attorneys for the defendants concede that evidence obtained illegally by State officers may be used in a Federal court prosecution, and the attorneys for the Government concede that evidence obtained by illegal search by Federal officers or by State officers and Federal officers may not be used in Federal court.

While opposing counsel agree upon the basic legal questions involved, they do not agree upon the application of the facts; and, ultimately, the attorneys for both defendants and the Government are confronted with and find comfort in the language of Lustig vs. United States, 338 U. S. 74.

Byars vs. United States, 273 U. S. 28, preceded Lustig by twenty-two years. In Byars, the Court said: "While it is true that the mere participation in a state search of one who is a federal officer does not render it a federal undertaking, the court must be vigilant to scrutinize the attendant facts with an eye to detect and a hand to prevent violations of the Constitution by circuitous and indirect methods." Byars further held: "We do not question the right of the federal government to avail itself of evidence improperly seized by state officers operating entirely upon their own account."

In Lustig, the Court, in discussing the Byars case said: "The crux of that doctrine is that a search is a search by a federal official if he had a hand in it; it is not a search by a federal official if evidence by state authorities is turned over to the federal authorities on a silver platter. The decisive factor in determining the applica-

bility of the Byars case is the actuality of a share by a federal official in the total enterprise of securing and selecting evidence by other than sanctioned means."

At the conclusion of the hearing on the motions to suppress, the trial court overruled the motions and made the following statement: "In this case, the whole transaction was completed long before there was any Federal Agent ever told about the matter at all. And there was no selection of evidence or no going over the evidence except that Mr. Gress did look at the marihuana, just visually inspected it according to all the testimony and then the next day or some day following, was when it was turned over by another officer, by Captain Nelson, to the Narcotics Bureau."

Again, the trial court said: "The basic question is whether there was sufficient Federal participation to bring the rule within the Federal Rule or whether the search by the State Officers is subject to examination on that basis."

Repeatedly, in ruling on the motion to suppress, the Court stated that the search and seizure were made without the participation or involvement of any Federal officer.

We have carefully read the entire record. There is no material conflict as to what actually occurred and as to when it occurred. We agree with the trial court's summary of the facts and in its conclusion. We share the view of the trial court that the decisive factor necessary to show participation of Federal officials in the search and seizure is lacking.

II

There remains for consideration a second contention of the defendants and that is alleged misconduct of the Government attorney, which they assert was prejudicial to

the rights of the defendants and by reason thereof they were entitled to a mistrial. Again, there is no disagreement as to what actually occurred. The attorney for the Government called as a Government witness the lieutenant in charge of the Bureau of Identification of the Police Department of the City and County of Denver and asked him if he had certain records; and when the lieutenant responded that he did have the records, he was asked to produce them. The records were the police records that had been made at the time the defendants were lodged in jail. There were four exhibits — one for each defendant. When the records were produced, the attorney handed them to the reporter to be marked for identification. Immediately, the attorneys for the defendant approached the bench and asked the Court to declare a mistrial. The court recessed, and in chambers the matter was fully presented to the trial court. The attorneys for the defendants stated that they believed that the jury had seen or could have seen the exhibits and that, as a result, might be prejudiced against the defendants. *The Court did not share in the belief that the jury had seen the exhibits or observed them to the extent that they knew the contents thereof.* The Court agreed that the exhibits were not proper evidence, particularly at the time they were identified, and directed that they not be returned to the courtroom and denied the motion for mistrial. The trial court was in *much better position to observe and evaluate the effect of what had occurred,* and we accept his conclusion that the identification of the exhibits, under the circumstances, was not sufficient to require a mistrial.

Judgment of the trial court is AFFIRMED.

Appendix B

Judgment of Joseph Aguilar Gaitan.

Fourteenth Day, January Term, Thursday, January 23rd, 1958.

Before Honorable Sam G. Bratton, Chief Judge, Honarable John C. Pickett, Circuit Judge, and Honorable Eugene Rice, District Judge.

This cause came on to be heard on the transcript of the record from the United States District Court for the District of Colorado and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment and sentence of the said district court in this cause be and the same is hereby affirmed.

It is further ordered by this court that Joseph Aguilar Gaitan, appellant, surrender himself to the custody of the United States Marshal for the District of Colorado, in execution of the Judgment and sentence imposed upon him, within ten days from and after the date of the filing of the mandate of this court in said district court.

Judgment of Dolores Mary Gaitan.

Fourteenth Day, January Term, Thursday, January 23rd, 1958.

Before Honorable Sam G. Bratton, Chief Judge, Honarable John C. Pickett, Circuit Judge, and Honorable Eugene Rice, District Judge.

This cause came on to be heard on the transcript of the record from the United States District Court for the District of Colorado and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment and sentence of the said district court in this cause be and the same is hereby affirmed.

It is further ordered by this court that Dolores Mary Gaitan, appellant, surrender herself to the custody of the United States Marshal for the District of Colorado, in execution of the Judgment and sentence imposed upon her, within ten days from and after the date of the filing of the mandate of this court in said district court.

Judgment of Aniseto Silva.

Fourteenth Day, January Term, Thursday, January 23rd, 1958.

Before Honorable Sam G. Bratton, Chief Judge, Honarable John C. Pickett, Circuit Judge, and Honorable Eugene Rice, District Judge.

This cause came on to be heard on the transcript of the record from the United States District Court for the District of Colorado and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment and sentence of the said district court in this cause be and the same is hereby affirmed.

Order Denying Petition for Rehearing.

Twenty-fifth Day, January Term, Saturday, February 8th, 1958.

Before Honorable Sam G. Bratton, Chief Judge, Honorable John C. Pickett, Circuit Judge, and Honorable Eugene Rice, District Judge.

These causes came on to be heard on the petition of appellants for a rehearing herein and were submitted to the court.

On consideration whereof, it is ordered by the court that the said petition be and the same is hereby denied.

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JOHN T. FEY, Clerk

No. 843

In the Supreme Court of the United States

OCTOBER TERM, 1957

JOSEPH AGUILAR GAITAN, DOLORES MARY GAITAN, AND ANISETO SILVA, PETITIONERS

v.

UNITED STATES OF AMERICA

On Petition for Writs of Certiorari to the United States Court of Appeals for the Tenth Circuit

---

BRIEF FOR THE UNITED STATES IN OPPOSITION

J. LEE RANKIN,
Solicitor General,

MALCOLM ANDERSON,
Assistant Attorney General,

BEATRICE ROSENBERG,
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In the Supreme Court of the United States

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No. 843

JOSEPH AGUILAR GAITAN, DOLORES MARY GAITAN, AND ANISETO SILVA, PETITIONERS

v.

UNITED STATES OF AMERICA

On Petition for Writs of Certiorari to the United States Court of Appeals for the Tenth Circuit

---

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (Pet. App. A) has not yet been reported.

JURISDICTION

The judgment of the Court of Appeals was entered January 23, 1958. A petition for rehearing was denied February 8, 1958. The petition for a writ of certiorari was filed on March 8, 1958. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

QUESTIONS PRESENTED

1. Whether there was federal participation in a search by state officers.

2. Whether evidence secured by state officers without federal participation was subject to the federal rule of exclusion.

3. Whether the court erred in denying a mistrial on the ground that exhibits, which were not identified or shown to the jury and which the judge subsequently ordered excluded, were marked for identification by the court reporter in the presence of the jury.

STATEMENT

In the United States District Court for Colorado, petitioners were convicted of conspiracy to violate the laws relating to marihuana. In addition, the Gaitans were jointly charged and convicted of receiving and possessing marihuana without having paid the required transfer tax and with concealment of the marihuana. Petitioner Silva, together with one Emmett, was convicted of transporting and concealing marihuana on which the required tax had not been paid and with unlawfully transferring the marihuana to the Gaitans (R. 2-5, 12-13). Joseph Gaitan was sentenced to imprisonment for ten years and the other petitioners to imprisonment for five years (R. 16-18).

Before trial, petitioners moved to suppress as evidence the marihuana taken from the apartment of the Gaitans on February 5, 1957. The motion was supported by affidavits of the Gaitans to the effect that their apartment had been illegally entered and

searched, but with no affidavit by Silva and no claim by him of ownership or possession of either the premises or the property (R. 6-8).

The circumstances of the search, as developed at the hearing on the motion to suppress and at the trial, may be summarized as follows:

The Gaitans were caretakers of premises at 1831 Williams Street in Denver and occupied the basement apartment (R. 56). State police began surveillance of the premises about 4:00 p. m. on February 5, 1957 (R. 71). At about 5:30 p.m., Joseph Gaitan and Emmett drove off, returning about 5:45. At about 6:00 p.m., a car with four young men drove up. One man knocked on the basement window and he and another went in by the side door. About ten minutes later, the two men emerged, and all four drove away (R. 72-74).

At about 6:15 p.m., Joseph Gaitan, Silva, and Emmett drove off, and returned about twenty minutes later. As they entered the house, Gaitan was observed carrying a box with groceries and Silva a fairly large shopping sack (R. 74-75). At about 7:30, two persons, one known to the surveilling officer, entered the premises and left about fifteen minutes later, one carrying a small sack (R. 75). Thereafter, three officers were sent to the rear of the premises (R. 76). At about 8:00 p.m., Emmett and Silva started to leave by the side door and were arrested on the landing. A tin can containing a substance believed to be marihuana was found on Emmett's person (R. 78). Thereafter, when one Wayne Blendley knocked on the outside door, Joseph Gaitan came up from his basement apartment to let him in (R.

39, 79). At that point, as Gaitan turned to go down, the officers displayed their guns, placed Gaitan and Blendley under arrest, and told them to go down to the apartment (R. 39, 79). The officers searched the apartment (R. 79). After asking Mrs. Gaitan to remove a crib in front of a trap door, one of the officers opened the door and found a sack containing a substance subsequently proved to be marihuana (R. 87-88). At the hearing on the motion to suppress, the Gaitans testified that the space back of the door was used for the house meters, that no one entered it except the meter man (R. 44, 45, 56).

After the marihuana was found at about 9:30 p.m., one of the state officers called federal narcotics agent Gress (R. 32, 46, 49). Gress came to the apartment entering through the open door. He looked at the package of marihuana in the hands of the state police (R. 32, 34, 40, 50-51). One of the policemen pointed out to Gress the door behind which the marihuana had been found (R. 34). When the police took Gaitan to police headquarters, Gress went along for "no particular reason unless it was one of custody, and assisting Captain Nelson to take him to the Police Department" (R. 36). There had been no communication between state and federal authorities before the call to Gress (R. 49, 52). The arrested defendants were held in state custody overnight (R. 52) and the marihuana was retained by state officials until late the next day when the federal authorities adopted the case (R. 51-52).

The District Court held that there was no basis for sustaining the motion to supress as to Silva (R. 59, 68). As to the Gaitans, the court denied the motion

on the ground that no federal participation had been shown (R. 64-68). The Court of Appeals affirmed.

ARGUMENT

1. There is no merit in petitioner's attack upon the finding of the two courts below (Pet. 7-8) that there was no showing of federal participation which would render the search a federal undertaking. The evidence establishes that the surveillance was undertaken by state officers without consultation or communication with the federal authorities. The federal authorities were not notified until the participants had been arrested and the search completed. The defendants and the marihuana were held in state custody at least a day after the arrest until the federal authorities decided to adopt the case. The mere fact that, after the search had been completed, the state authorities notified a federal agent and he came down to the apartment and looked at the marihuana does not serve to bring this case within the holding of *Lustig* v. *United States*, 338 U.S. 74. In the *Lustig* case, federal participation was found by reason of the fact that the federal officer initiated the investigation by state authorities, and the federal officer, who came onto the premises before the search was concluded, shared "in the critical examination of the uncovered articles as the physical search proceeded" and "had a vital share in sifting the evidence." (338 U.S. at pp. 78-79). Here, on the other hand, the search "had run its course" and "the object of the search was completely accomplished" (*id.*) before the federal authorities were even called. The case is, as the District Court

noted, very close to *Symons* v. *United States*, 178 F. 2d 615, 618 (C.A. 9), certiorari denied, 339 U.S. 985, where no federal participation was found even though the federal officer, notified after the search was completed, came down and thereafter took charge of further proceedings. See also *Shurman* v. *United States*, 219 F. 2d 282, 286-288 (C.A. 5), certiorari denied, 349 U.S. 921.[1]

2. Relying on the statement in a footnote in this Court's decision in *Benanti* v. *United States*, 355 U.S. 96, 102, fn. 10, that it "has remained an open question in this Court whether evidence obtained solely by state agents in an illegal search may be admissible in federal court, despite the Fourth Amendment", petitioner asks for reexamination of the so-called "silver platter" doctrine. The federal courts have been operating under the doctrine since the rule of suppression was first enunciated in *Weeks* v. *United States*, 232 U.S. 383. The *Weeks* decision itself had held that evidence secured by state officers not acting under any claim of federal authority was admissible in a federal court. 232 U. S. at p. 398. In *Byars* v. *United States*, 273 U.S. 28, 33, the Court said that it did "not question the right of the federal government to avail itself of evidence improperly seized by state officers operating entirely upon their own account." And in *Lustig* v. *United States*, 338 U.S. 74, the four dissenting justices, together with Justice Frankfurter, indicated their adherence to the position that a search

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[1] The petition for a writ of certiorari in the *Shurman* case did not raise this issue (No. 671, O.T., 1954).

"is not a search by a federal official if evidence secured by state authorities is turned over to the federal authorities on a silver platter." 338 U.S. at pp. 78-79. Since *Lustig*, as well as before, the "silver platter" doctrine has been accepted as controlling in numerous decisions of the Courts of Appeals. *Losieau* v. *United States*, 177 F. 2d 919, 923 (C.A. 8); *Parker* v. *United States*, 183 F. 2d 268, 270 (C.A. 9); *Fredericks* v. *United States*, 208 F. 2d 712, 714 (C.A. 5), certiorari denied, 347 U.S. 1019; *United States* v. *Stirsman*, 212 F. 2d 900, 905 (C.A. 7); *Jones* v. *United States*, 217 F. 2d 381 (C.A. 8); *United States* v. *White*, 228 F. 2d 832, 835 (C.A. 7); *Collins* v. *United States*, 230 F. 2d 424, 425 (C.A. 6).

We suggest that there is no occasion at this time to reexamine this long-enunciated doctrine. This Court held in *Wolf* v. *Colorado*, 338 U.S. 25, and *Irvine* v. *California*, 347 U.S. 128, that the Fourth Amendment does not require that state courts adopt the federal rule of exclusion. Whether or not state officers should be subject to the deterrent effect of the exclusionary rule has, under our federal system, been left for state determination. A rule which would exclude from federal courts evidence obtained by state officers acting entirely under state authority would therefore not deter state officers. It would exclude relevant evidence from federal courts for actions over which federal authorities have no control, without necessarily vindicating the rights of the individual involved. Thus, such a rule would serve neither of the purposes which the exclusionary rule was designed to meet. It would neither serve to protect the indi-

vidual nor act as a deterrent against improper official action.[2]

3. The government called as a witness a member of the Denver police in charge of identification and asked whether he had produced "certain records" (R. 80). They were handed to government counsel who asked the reporter to mark them for identification (R. 80). At that point, defense attorneys approached the bench and asked for a mistrial. In chambers, defense counsel argued that the exhibits were police records accompanied by arrest records, pictures and statements; that they were marked in close proximity to the jury; and that "we cannot presume on anything that somebody on that Jury does not know what these items are" (R. 81). The District Court ruled that the exhibits were not proper evidence and directed that they not be returned to the court room (R. 81-84). However, the court denied the motion for a mistrial, noting that the records were not identified as anything other than records of the police department and that nothing was exhibited to the

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[2] It should be noted that petitioner Silva has no standing to complain of the search, or to have the evidence suppressed, since he claimed no interest in either the premises or the property. *Goldstein* v. *United States*, 316 U.S. 114, 121; *Shurman* v. *United States*, 219 F. 2d 282, 288 (C.A. 5), certiorari denied, 349 U.S. 921; *Lagow* v. *United States*, 159 F. 2d 245, 246 (C.A. 2), certiorari denied, 331 U.S. 858. Since the contraband marihuana was not property which would have been returned, it was properly admissible against Silva on the second count which did not involve the Gaitans (R. 4), regardless of any ruling on the motion to suppress as to the Gaitans. The sentence of five years received by Silva was imposed on each of counts 1-3, to run concurrently (R. 18).

jury. He stated "my own notion is that the Jury never saw these or never were able to see them close enough to identify what they were" (R. 83). This ruling, within the area of the discretion of the trial judge, was fully justified. The mere marking of four exhibits, each in four parts, could hardly have been meaningful to the jury.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for writs of certiorari should be denied.

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